Nos. 16-72572, 16-73236 (consolidated)

United States Court of Appeals
for the Ninth Circuit

Parks Foundation, *Petitioner-Appellant*

v.

Commissioner of Internal Revenue, *Respondent-Appellee*

and

Loren E. Parks, *Petitioner-Appellant*

v.

Commissioner of Internal Revenue, *Respondent-Appellee*

Appeals from the United States Tax Court
Nos. 7093-07, 7043-07

Brief of Appellants

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Corporate Disclosure Statement

Petitioner-Appellant Loren E. Parks ("Parks") is an individual. Petitioner-Appellant Parks Foundation ("Foundation") is a corporation exempt from income tax under 26 U.S.C. § 501(c)(3) and classified as a private foundation under 26 U.S.C. § 509(a). Foundation has neither parent corporation nor stock, so no publicly held corporation owns 10% or more of any stock. FRAP 26.1.

Oral Argument Request

Foundation and Parks request oral argument because the issues involved are of national import, the issues are somewhat complex, and there will be significant value in counsel being able to respond to questions from the Court and clarify facts, legal context, constitutional analysis, and arguments as needed. FRAP 34(a)(1).

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Jurisdiction[1]

The tax court had jurisdiction over Appellants' petitions (ER–318, 150) for redetermination of Notices of Deficiency (ER–188, 198). 26 U.S.C. §§ 6213(a), 7442; 5 U.S.C. § 706. Under 26 U.S.C. § 7482(a)(1), (c)(1), this Court has jurisdiction to review that court's Opinion (ER–8) and final Decisions (ER–1, 4), *Meruelo v. CIR*, 691 F.3d 1108, 1114 (9th Cir 2012), resolving all issues.[2] The Opinion was filed November 17, 2015, and Decisions on May 10, 2016. (ER–1, 4, 8.) Appeals were timely noticed July 27, 2016. (ER–117, 120.)

Issues, Reviewability & Standard of Review

Under challenged 26 U.S.C. § 4945 and regulations thereunder, private-foundation expenditures for "attempt[s] to influence legislation" (herein "influence-attempt") are taxable, *id.* § 4945(d)(1), unless "making available results of nonpartisan analysis, study, or research," *id.* § 4945(e). That exception "includes any activity that is 'educational' within the meaning of [26 C.F.R.] § 1.501(c)(3)–1(d)(3)." 26 C.F.R. § 53.4945(2)(d). Where speakers advocate viewpoints, "educational" is now determined by the Methodology Test (Add.–35 (Rev. Proc. 86-43)), which also governs exempt "educational" activity under 26 U.S.C. § 501(c)(3).

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[1] Abbreviations: "Add.–__" (Addendum); "ER–__" (Excerpts of Record); "CIR"/"IRS" (Appellee); "Foundation" (Parks Foundation); "Parks" (Mr. Parks).

[2] All issues were finally decided on stipulated facts under T.C. Rule 122.

Influence-attempts are determined by the Refer-Reflect Test—whether communications "refer[] to specific legislation" and "reflect[] a view." 26 C.F.R. § 56.4911–2(b)(1)(ii). Standard of review for the following legal issues is de novo, without "special deference." *Meruelo*, 691 F.3d at 1114.

1. Whether rational-basis scrutiny and placing the burden on First Amendment challengers (ER–48, 101-14) violates the First Amendment.[3]

2. (a) Whether Foundation's messages cannot be deemed "attempt[s] to influence legislation," 26 U.S.C. § 4945(d)(1), (e), because that phrase, along with the Refer-Reflect Test, the "illustrative examples" (ER–55-56), and the tax-court's construction thereof (ER–56-57) violate the First Amendment for vagueness and overbreadth, facially and as applied, and

(b) under a proper construction none is an influence-attempt.[4]

3. (a) Whether Foundation's messages cannot be deemed not "educational" because 26 U.S.C. § 4945 and regulations thereunder, including the Methodology Test, so violate the First Amendment, facially and as applied, as to "defy . . . application," *BMR*, 631 F.2d at 1034-35, and

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[3] First Amendment standard of review/challenges were asserted (ER–123-29, 134-41, 152) and decided (ER–48, 99-115).

[4] First Amendment challenges to 26 U.S.C. § 4945 and regulations thereunder were asserted (ER–123-29, 134-41, 152) and decided (ER–48-65, 99-115). Vague provisions are "void for vagueness," *Gentile v. Nevada*, 501 U.S. 1030, 1048 (1991), and facial remedies are proper if IRS latitude burdens speech, *Big Mama Rag v. U.S.*, 631 F.2d 1039, 1034-35 (D.C.Cir. 1980) ("*BMR*"). *See infra* note 5.

(b) under a proper construction they are educational.[5]

4. Whether the tax court's reliance on government statements (herein "Ballot-Pamphlet Test") to establish truth (in applying the Methodology Test) violates the

[5] First Amendment challenges to 26 U.S.C. § 4945 and regulations thereunder, including the Methodology Test, were asserted (ER–123-29, 134-41, 152) and decided (ER–48, 99-115). The court said Petitioners don't challenge the Methodology Test (ER–68 n.49) but said they "argue that section 4945 and the regulations thereunder [which *encompass* the Methodology Test], as applied to Foundation's expenditures for the radio messages, impermissibly burden their First Amendment right to free speech" (ER–99), and the Methodology Test *is* the application of § 4945 (Add.–36 ("in applying" what is "educational")). Petitioners said "I.R.C. § 4945 is unconstitutionally vague and violates Petitioners' First Amendment rights (ER–135), the Methodology Test "must now be read with an overlay of the Supreme Court's holding in [*FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (controlling opinion; herein "*WRTL-II*")]" (ER–140), CIR must apply a "bright-line test," "similar to [*WRTL-II*'s]," and "Petitioners would satisfy such a test" (ER–125). Given this First Amendment challenge, Petitioners permissibly challenge the Methodology Test facially. *See Citizens United v. FEC*, 558 U.S. 310, 329-31 (2010) (even a dismissed facial challenge didn't bar one on appeal, given the First Amendment challenge). The Methodology Test is under the "umbrella" of Appellants' constitutional challenges. *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992); *accord Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004). Where "the question presented is one of law, [the appeals court] consider[s] it in light of 'all relevant authority,' regardless of whether such authority was properly presented in the district court." *Ballaris*, 370 F.3d at 908. *See also Turnacliff v. Westly*, 546 F.3d 1113, 1120 (9th Cir. 2008) (pure question of law may be first considered on appeal). Issues may be raised first on appeal if of great public importance, *Krause v. Sacramento Inn*, 479 F.2d 988, 989 (9th Cir. 1973), especially where "[s]ignificant constitutional questions are involved" and "delay . . . could unconstitutionally chill . . . first amendment rights." *Ripplinger v. Collins*, 868 F.2d 1043, 1054 (9th Cir. 1989). The Methodology and Refer-Reflect Tests are "so vague as . . . to defy . . . attempts to review [their] application in this case," *BMR*, 631 F.2d 1034-35, requiring facial relief.

First Amendment for making government the truth-arbiter and creating an unprecedented test that is vague, lacking in notice, and subject to arbitrary enforcement.[6]

5. Whether Parks is protected from taxes because Foundation's messages are non-taxable; his approval was not "knowing[ly]" in violation of the law and was "not willful and [wa]s due to [the] reasonable cause" of believing the expenditures non-taxable; he properly relied on counsel advice; and "advice of counsel" provisions, 26 U.S.C. 4945(a)(2), 26 C.F.R. § 53.4945–1(a)(2)(vi), violate the First Amendment as applied and facially.[7]

An Addendum contains pertinent provisions.

Case[8]

Parks is the manager of Foundation, a Nevada corporate nonprofit, 26 U.S.C. § 501(c)(3), and private foundation, 26 U.S.C. § 509(a). Parks approved Foundation expenditures for ten messages (ER–22-38), seeking counsel advice on nine (ER–23-24, 27, 31, 39). IRS said they attempted to influence ballot measures and were taxable, (ER–188, 191, 198, 201.) The messages follow (formatting altered).

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[6] First Amendment burden/vagueness challenges to 26 U.S.C. § 4945 and regulations thereunder, including the Methodology Test, and their application were raised (ER–152), briefed (ER–123-29, 134-41), and decided (ER–111-14), but the court's unconstitutional analysis here first appeared in its Opinion (ER–70-71).

[7] The nontaxable nature of the messages was asserted and decided as set out in preceding issues. Reliance on counsel was asserted (ER–134, 141-42, 319-21), and decided (ER–88-96). A facial challenge is permissible. *See supra* note 5.

[8] Stipulated Facts were incorporated by reference. (ER–11, 158.)

> [**#1.**] I'll bet you thought Oregon prisoners would be working 40 hours a week by now. Back in 1994, that's what voters overwhelmingly told the politicians to do. But the governor and attorney general have said, NO, we're not gonna do it. Attorney General Hardy Myers says the federal government doesn't like the way Oregon pays it's [sic] prisoners. And so, he and the Governor have decided to shut down the program entirely. Some people just don't think criminals should spend much time in jail. They think they can be rehabilitated. If they really wanted prisoners to work, they'd just change the way we to [sic] pay them. When Hardy Myers was Speaker of the House, he took credit for changing Oregon's criminal statutes. Those changes resulted in the average convicted murderer spending less than 7 years in jail. That's why Oregon Voters had to step in and take control. We said it loudly and clearly, "Put criminals in jail. Make 'em do their time, and work 'em while they're there." What Oregon voters didn't say was, "Make a bunch of whiney excuses why you can't do what we want done."

(ER–19-20.)[9]

> [**#2.**] Back when John Kitzhaber was Senate President Legislation was passed that resulted in a convicted murderer, given a life sentence, actually serving less than 7 years in jail ... They said they didn't have enough jail space. But then came Measure 11. It required mandatory sentences for violent criminals with no possibility of early release ... and ... it required the state to build enough jail space. They said it would cost billions of dollars. But it didn't. And since Measure 11, violent crime in Oregon has gone down. And now Measure 61's on the ballot. It requires mandatory sentences for criminals convicted of property crimes. You live in Portland. You get your car stolen or your house burglarized there won't be jail ... just probation. If Measure 61 passes, that criminal goes to jail. And they'll have to build enough jail space to keep 'em... There'll be no early release. It's Measure 61. Paid for in the public interest by the Parks Foundation.

(ER–22 (tax court footnote describing *past* Measure 11 omitted).)[10]

> [**#3.**] The citizens, not the politicians, passed Measure 11 putting violent criminals

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[9] The court found #1 (1997) an attempt to influence Measure 49 (ER–57-58), involving prison work requirements (ER–18-19), and non-educational (ER–71-72).

[10] The court found #2 and #3 (1998) attempts to influence Measure 61 (ER–58-59), involving criminal sentencing (ER–20-21), and non-educational (ER–72-75).

> in jail. Up 'till then, a convicted murderer with a life sentence served less than 7 years. They said it would cost billions. But, it didn't. And the crime rate went down. And now ... Measure 61. You live in Portland, you get your car stolen ... your house burglarized ... there won't be jail ... just probation. With Measure 61, that criminal absolutely goes to jail ... and no early release. (Measure 61.) Pd for by the Parks Foundation.

(ER–23.)[11]

> [**#4.**] Right now, without even knowing it, you're being forced to live under laws created not by elected officials but by non-elected government bureaucrats. They're called administrative rules. Here's what happens: The legislature passes a law to keep a watchful eye on growth and tells its hired workforce to carry out that law. So Jack and Bev Stewart turn 90 acres of Polk County brush piles into a horse farm. Because horses are expensive and easily stolen, they want to build a farmhouse so they can be there. But the government bureaucrats say no, we're not gonna let you until you earn $80,00 [sic] off the property. The Stewarts say. We can't do that until we get more horses ... the bureaucrats say tough, that's your problem, not ours. When a legislator's asked how government can get away with this he says we never intended for this to happen. So the Stewarts are stuck ... all they did was turn 90 acres of noxious weeds into income producing, taxpaying farm acreage. It's called administrative rules ... and you're gonna hear a lot more about 'em in the weeks to come.

(ER–25-26.)[12]

> [**#5.**] Right now, without even knowing it, you're being forced to live under laws created not by elected officials but by non-elected government bureaucrats. They're called administrative rules. Here's what happens: The Good Sheppard [sic] Church of Clackamas County purchased the only available piece of land in the area to build a new church. It's zoned for farm use. But even though the elected legislature passed a state law allowing churches to build on farmland, the nonelected bureaucrats made up an administrative rule saying, we're not going to let you do it. And it doesn't matter whether the land is any good or not. So in the mean time [sic], the Good Shepherd Church has been denied a building permit

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[11] *See* preceding footnote.

[12] The court found #4 and #5 (1998) attempts to influence Measure 65 (ER–59-60), involving administrative rules (ER–24-25), and non-educational (ER–75-76).

> on their own land even though state law says it's OK. It's called administrative rules ... and you're gonna hear a lot more about 'em in the weeks to come.

(ER–26-27.)[13]

> [**#6.**] District 5 State Representative Jim Hill is one of the very few Republicans in the state house fighting against the victims of crime. 2 years ago, a wide majority of Oregonians voted to get tough on criminals by passing Measure 40. But the liberal state Supreme Court threw it out saying it contained too many subjects. The state house has just voted to split Measure 40 into 8 separate amendments to be reapproved by the voters. Who would be against this? The liberals and criminal defense lawyers. Some Democrats joined with most of the Republicans to support victims' rights ... very few Republicans didn't. Your district 5 State Representative Jim Hill is one of them. Many victims of crime urged the passage of Measure 40 because they wanted the victims to be treated at least as well as the criminals. But Jim Hill fought us all the way. The Parks Foundation paid for this message because we want you to know what your elected officials really do once they get to Salem.

(ER–29.)[14]

[**#7.**] "The second radio message was identical to the first except that it substituted District 34 State Representative Lane Shetterly for Representative Hill."

(ER–29.)[15]

> [**#8.**] Portland Police have just arrested 32-year-old Todd Reed for the gruesome serial murders of 3 women. But what about Todd Reed's criminal history? In '81 he was convicted of burglary. In '82, burglary. In '87 convicted of 3 more burglaries. In '92 he was arrested for 3 counts of rape, 2 counts of sodomy, 5 counts of kidnaping, I [sic] count each sex abused [sic] and menacing. After plea-bar-

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[13] *See* preceding footnote.

[14] The court found #6 and #7 (1999) attempts to influence Measures 69-75 (ER–61-62), involving criminal prosecutions (ER–27-28), and non-educational (ER–76-77).

[15] *See* preceding footnote.

> gaining he got a 17-year sentence. But this was Oregon before Measure 11. He spent 2 years in jail. But if he was under Measure 11, there'd be no early release; he'd still be in jail. The State Senate just voted to allow some violent Measure 11 convicts a 15% reduction in prison time. Now, who would do that? From the Portland area, Senators Kate Brown, Ginny Burdick and Frank Shields. And the one most responsible, Neil Bryant of Bend. The Parks Foundation paid for this because we want you to know what the politicians really do once they get to Salem.

(ER–30-31.)[16]

> [**#9.**] Is Oregon State government really growing nearly 3 times faster than the personal income of those who pay its bills? Oregonians will soon be asked if they want to slow down the growth of their State government. Here are the facts. From 1989 to 91 State government grew by 21%, citizen income grew less than 9%. In 93 State income up 20%, citizens' income just 11%. In 95 State incomes up another 23%, private pay up less than 11%. And in 97 the State income was up 14% and private pay just 8%. So what all this means is that over the last 10 years the State increased its income by more than 130%, while private pay increased less than 50%. Our Tax dollars to State government have increased nearly 3 times faster than the personal income of its own citizens. And those are the State's own figures. Paid for by the Parks Foundation.

(ER–34-35.)[17]

> [**#10.**] A few weeks ago, the Parks Foundation revealed that, over the last 10 years, Oregon government income has grown by 130%, nearly 3 times faster than the personal income of citizen's who pay for it. The state government didn't like what we said. They filed a lawsuit against us. But, like it or not, the general fund budget has gone from $4 to $10 billion. And where's that money gone? A big part of it goes to the Oregon Health plan that just paid a quarter million dollars for a convicted child molester from Mexico to receive a bone marrow transplant .... And 2 brain surgeries for an out of state man ... Gall bladder surgery for an out

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[16] The court didn't find #8 (1999) an influence-attempt but held it non-educational. (ER–84-85.)

[17] The court held #9 (2000) referred to and reflected a view on Measure 8 (ER–62-64), about limiting State spending (ER–33-34), but held it educational, so neither an influence-attempt nor for a nonexempt purpose (ER–77-82).

> of state woman ... And 2 knee replacements for a skier who lives off a trust fund but said he had no income. The state government is using taxpayers' money to intimidate us from revealing this kind of information. Isn't that what Richard Nixon did when he used the IRS to go after his political enemies? Paid for by the Parks Foundation.

(ER–38.)[18]

Appellants' tax-court Petitions were consolidated. (ER–322, 324), with an Amended Petition (ER–324) adding claims that (as the court put it) "section 4945 and the regulations thereunder, as applied to Foundation's expenditures for the radio messages, impermissibly burden their First Amendment right to freedom of speech" (ER–99). Petitioners challenged these provisions and their application (which includes the Methodology Test) as "unconstitutionally vague and [as] violat[ing] the First Amendment" and for not applying the "standard of review . . . in . . . [*WRTL-II*, 551 U.S. 449]." (ER–152.)

Appellants argued (inter alia) that, because issue advocacy is involved, higher scrutiny is required (ER–138), so the Methodology Test "must now be read with an overlay of . . . *WRTL*[*-II*]." (ER–140.) They "would satisfy such a test," they asserted. (ER–125.) They noted the IRS applies an unconstitutional "facts-and-circumstances test to determine whether an organization is participating or intervening in a political campaign" (ER–125 (citing Rev. Rul. 2007-41)), that "'[in]

[18] The Court found #10 (2000) *not* an attempt to influence Measure 8 (ER–64-65) but *not* educational and so for a nonexempt purpose (ER–86-87).

this area the First Amendment cannot countenance [such] a subjective "I know it when I see it" standard'" (ER–125 (quoting *BMR*, 631 F.2d at 1040)), and that a "bright-line test is required to protect First Amendment Speech" (ER–125). (*See also* ER–128 ("a facts and circumstances test is constitutionally deficient" and IRS may not "chill" speech with such vague, overbroad tests).) Appellants argued that the Refer-Reflect Test is unconstitutionally vague (ER–126-29, 137-39) and that, under a proper interpretation, their messages don't "refer[] to" ballot measures (ER–128). They argued that, under a constitutionally proper interpretation, their messages were "educational." (ER–139-41.) Parks argued (inter alia) that he properly relied on counsel's advice under 26 C.F.R. § 53.4945-1(a)(2)(vi) so he should not be assessed taxes. (ER–141-42.)

CIR argued (inter alia) that "[s]ection 4945 is not unconstitutional, as applied *or otherwise*." (ER–147 (emphasis added).)

Applying rational-basis scrutiny to "subsidies" (ER–112), the court found no First Amendment violations (ER–99-107). But two things it expressly upheld against purported challenge were not at issue: (1) government discretion in subsidizing (ER–104-05) and (2) using excise taxes to enforce (ER–99, 105-06). Applying the Refer-Reflect Test, it held that "refers to" is not unconstitutionally vague under subsidy-level scrutiny (ER–104-07) and eight messages "refer" to ballot measures (ER–54-65). Applying the Methodology Test, it found all but

Message 9 not "educational." (ER–65-80.) It held Parks's approval not excused, including for relying on counsel advice. (ER–88-96.) The Opinion was filed November 17, 2015. (ER–8.) The Decisions were filed May 10, 2016. (ER–1, 4.) Notices of Appeal were timely filed July 27, 2016. (ER–117, 120.)[19]

Argument Summary

Government need not provide tax-exemptions. But if it does, the First Amendment requires non-subjective, non-vague, speech-protective tests to safeguard educational issue advocacy. "These standards are especially stringent, and an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning." *BMR*, 631 F.2d at 1035. In First Amendment challenges, "First Amendment scrutiny" applies, *id.* at 1036, with the burden on the government, *see, e.g.*, *id.* at 1039. These requirements constitute the "First-Amendment Mandate." *See* I.

Appellants are not liable for excise taxes because their messages cannot be deemed "attempt[s] to influence legislation," 26 U.S.C. § 4945(d)(1). The Refer-Reflect test, 26 C.F.R. § 56.411–2(b)(ii), violates the First-Amendment Mandate, so it cannot be applied to deem the messages influence-attempts. Under proper constructions of "attempt[] to influence," "refers," and "reflects," no message is an influence-attempt. *See* II.A.

[19] Appeals were consolidated October 17, 2016. (Dkt. 13.)

Were any message an influence-attempt, it is nontaxable "educational" activity. The Methodology Test (Add.–35) violates the First-Amendment Mandate for the reasons that IRS's prior "educational" definition was unconstitutional. *BMR*. 631 F.2d 1030. The Methodology Test is likewise incapable of application and cannot be employed to deem the messages non-educational. Under a proper construction of "educational," the messages are educational. *See* II.B.

As the messages are non-taxable, Parks's approval is non-taxable. Were one taxable, approval was non-knowing/non-willful and due to reasonable cause under precedents. He reasonably relied on counsel advice, and any construction of applicable provisions to the contrary violates the First-Amendment Mandate. *See* III.

Argument

I.

CIR Bears the "Especially Stringent" Burden of "First Amendment Scrutiny," a "Strict Standard" Rejecting "Latitude for Subjectivity."

Government need not provide tax exemption to educational-issue-advocacy entities/activities, but exemptions neither eliminate the First-Amendment Mandate nor require rational-basis scrutiny as held below. (ER–102-05, 112.) *BMR* held that "though tax exemptions are a matter of legislative grace," 631 F.2d at 1034, where educational-issue-advocacy is involved, tests must comply with the First Amendment Mandate, *id.* at 1034-35.

"These standards are especially stringent, and an even greater degree of speci-

ficity is required, where . . . exercise of First Amendment rights may be chilled by a law of uncertain meaning." *Id.* at 1035. A "strict standard . . . must be applied," *id.*, "First Amendment scrutiny," *id.* at 1036, and the government must justify its tests, *id.* at 1038-40.[20] "[R]egulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials." *Id.* at 1034. *See also id.* at 1040 (same). Tests require "criteria capable of neutral application." *Id.* "In this area the First Amendment cannot countenance a subjective 'I know it when I see it' standard." *Id. BMR* and this First-Amendment Mandate are the proper analysis here because the Methodology Test replaces the "educational" test *BMR* held unconstitutional and has the flaws *BMR* found in the same context.

Other "subsidy" cases, such as *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), don't control. *Finley* didn't involve the precise issue/context here, as does *BMR*. *BMR* forbade subjectivity; *Finley* tests were *supposed* to be subjective. *Id.* at 590. *BMR* cautioned chill; in *Finley*, it was "unlikely." *Id.* at 588.

Regan v. Taxation without Representation of Wash., 461 U.S. 540 (1983), doesn't control. The court below held First Amendment-scrutiny arguments "misplaced" as "*WRTL*[*-II*] and *Citizens United* involved outright bans" (ER–101)[21]

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[20] *BMR* gave IRS the burden to justify its test, *id.*, and "the burden involved in reformulating the definition of 'educational' to conform to First Amendment requirements," *id.* at 1040. But the court here gave Appellants the burden. (ER–48.)

[21] The "outright ban" scrutiny-level argument is refuted *infra* at 17-18.

while *Regan* held that subsidy-denial was the rational basis for banning "substantial lobbying." (ER–102-07). But at issue here is *BMR*'s issue—distinguishing educational issue advocacy from lobbying—not doing *substantial* lobbying, and the ability to ban the latter doesn't authorize tests violating the First-Amendment Mandate as held below. (ER–105-05.)[22] Citing *Regan*, the tax court said Parks could speak through a 501(c)(4) for lobbying but admitted *Citizens United* vitiated this alternate-channel doctrine (ER–109-10). One entity cannot satisfy another's speech-right, *Citizens United*, 558 U.S. at 337, so a 501(c)(4) cannot vindicate Parks's or Foundation's rights.

The court below said the greater power (non-subsidy) includes the lesser (regulating educational issue advocacy with tests violating the First-Amendment Mandate). (ER–101-14.) But the greater-justifies-lesser argument is erroneous. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), held that states need not elect judges, but if they do, the power to not have judicial elections includes no power to restrict speech. *Id.* at 788. *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988), also "reject[ed the] argument that the greater power to end voter initiatives includes the lesser power to prohibit paid petition-circulators." *White*, 536 U.S. at

[22] The tax court relied on *Finley*'s statement that the subsidy context permits "'criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.'" (ER–112 (citation omitted).) But *Finley* didn't address the First-Amendment Mandate for tests for ongoing speech—as in *BMR* and here.

788. And *BMR* rejected the greater-justifies-lesser argument, in the present context: "[T]hough tax exemptions are a matter of legislative grace," 631 F.2d at 1034, "regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials," *id.*

BMR said bright-line rules are mandated to provide "notice," *id.* at 1035, "avoid arbitrary and discriminatory enforcement," *id.* (no "subjective judgment"), and prevent chilled speech, *id.*

BMR held that "[m]easured by . . . the strict standard that must be applied when First Amendment rights are involved, the definition of 'educational' contained in [26 C.F.R.] § 1.501(c)(3)–1(d)(3) must fall because of its excessive vagueness." 631 F.2d at 1035. Whether the Methodology Test complies with *BMR* turns on comparing that Test with the following *BMR*-rejected language:

- "instruction to the public on subjects useful to the individual and beneficial to the community," *id.*,
- "controversial," *id.* at 1036-37,
- "full and fair," *id.* at 1037,
- "pertinent facts," *id.*,
- "sufficient . . . to permit an individual or the public to form an independent opinion or conclusion," *id.*,[23]

[23] "The Supreme Court has recognized that statutes [based on] individual sen-

- "whether the facts underlying the conclusions are stated," *id.* at 1038,[24]
- "doctrinaire," *id.*,
- "a . . . distinction . . . between appeals to the emotions and appeals to the mind," *id.* at 1038-39,[25] and
- "the preparation of material follows methods generally accepted as 'educational' in character," *id.* at 1037 n.13.[26]

So nothing like these is allowed—including both *fact-opinion* and *emotion-mind* distinctions along with *methodology* tests.[27] Yet IRS's tests, its briefing, and the decision below proceed as if *BMR* had not rejected these terms and approaches.

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sitivities are suspect and susceptible to attack on vagueness grounds." *Id.*

[24] "[D]istinguishing facts . . . [from] opinion or conclusion . . . does not provide an objective yardstick . . . to define 'educational.'" *Id.* All "will be [un]able to judge when . . . statement[s] must be bolstered by . . . supporting statement[s]." *Id.*

[25] The distinction is "difficult, a problem which is compounded if the difference between the two relies on the aforementioned fact/opinion distinction." *Id.* at 1039. "[W]e cannot approve" such a line because it is not supported by the regulation and because "the Supreme Court has recognized . . . [that] the emotional content of a word is an important component of its message." *Id.* (citing *Cohen v. California*, 403 U.S. 15, 26 (1971)). "Even if one could in fact differentiate fact from unsupported opinion, or emotional appeals from appeals to the mind, these proposed distinctions would be inadequate definitions of 'educational' because material often combines elements of each." *Id.* And there is no indication of "how much" of each would suffice. *Id.*

[26] *BMR* held that "those guidelines use the same conclusory terms as the regulation and are not helpful in clarifying its content." *Id.* Note that the problem was not only the use of "educational" to define "educational" but that "method" cannot define the "content" of "educational."

[27] The Refer-Reflect and Methodology Tests contain similar flaws. *See* II.

To protect issue advocacy, *BMR* rejected this language under the First Amendment, which imposes its own "especially stringent" non-vagueness requirements. *BMR*, 631 F.2d at 1035. The Supreme Court likewise mandates"precision" in distinguishing issue advocacy from campaign advocacy to prevent chilling the former. *Buckley v. Valeo*, 424 U.S. 1, 41-42 43 (1976). So it held (in the speech-*ban* context) that "relative to a clearly identified candidate was vague and overbroad unless "construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 39-44. And it imposed this construction (in the *disclosure* context) on the phrase, "for the purpose of . . . influencing" elections. *Id.* at 76-82.

To protect issue advocacy, *WRTL-II* rejected an "intent-and-effect test," 551 U.S. at 467, requiring tests to be "objective, focusing on the substance of the communication," "eschew[ing] 'the open-ended rough-and-tumble of factors,'" and "giv[ing] the benefit of any doubt to protecting rather than stifling speech," *id.* at 469 (citation omitted). *WRTL-II*'s test—whether an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.* at 470—was even vague unless applied atop the bright-line "electioneering communication" definition. *Id.* at 474 n.7.[28] Because the focus must be on a

[28] "Electioneering communications" are targeted, broadcast ads naming a "clearly identified candidate" in 30- and 60-day periods before primary and general elections respectively, 52 U.S.C. § 30104(f)(3).

communication's substance, "contextual factors" play little role, *id.* at 473-74, and neither support for candidates elsewhere[29] nor election proximity may be used to interpret communications as campaign advocacy, *id.* at 472.[30]

The tax court said First-Amendment-Mandate-compliant tests in *WRTL-II* flowed from strict scrutiny required for *banned* speech. (ER–112.) That is wrong because *Buckley* applied the express-advocacy construction in both ban and *disclosure* contexts. 410 U.S. at 44, 80. And *BMR* required such texts in the present *tax-exempt, educational* context. 631 F.2d at 1035-36. So CIR must prove challenged provisions meet the "strict" First-Amendment Mandate. *Id.* at 1035.

II.

Foundation's Messages May Not Be Deemed Influence-Attempts Or Non-Educational, So It Is Not Liable for Assessed Taxes.[31]

A. The Messages May Not Be Deemed "Attempt[s] to Influence Legislation."

26 U.S.C. § 4945(d)(1) taxes "attempt[s] to influence legislation," which phrase violates the First-Amendment Mandate for reasons that "for the purpose of influencing" was held unconstitutional in *Buckley*, 424 U.S. at 74-81. *Buckley*'s saving express-advocacy construction, *id.* at 80, is required to save "attempt[] to

[29] This introduces a forbidden "intent" test. *Id.* So ballot-measure support elsewhere cannot be considered in interpreting messages here.

[30] The tax court went beyond "a communication's substance" to consider who produced Foundation's messages and election proximity. (ER–13-14.)

[31] *Scrutiny level*: CIR bears the "especially stringent" burden of "First Amendment scrutiny," rejecting "latitude for subjective application." *See* Part I.

influence." But instead IRS implements this "influencing" statutory language for "direct lobbying communications," 26 C.F.R. § 56.4911–2(b)(iii)—which governs ballot-measure advocacy—with the Refer-Reflect Test, i.e., merely "refer[ring] to specific legislation" and "reflect[ing] a view on" it. 26 C.F.R. § 56.4911–2(b)(ii).

1. The Refer-Reflect Test Is Unconstitutional and May Not Be Applied.

As the tax court noted, Appellants "argue that the regulatory provisions that define direct lobbying communications are unconstitutionally vague." (ER–99.) Measured against *Buckley*'s "clearly identified" and "expressly advocate" standards, 424 U.S. at 80, or *WRTL-II*'s "appeal to vote" test, 551 U.S. at 469-70, or *BMR*'s rejected language, the Refer-Reflect Test is "so vague as to violate the First Amendment and to defy . . . application," *BMR*, 631 F.2d at 1034-35. So it cannot be applied to impose taxes.

Regarding "refers to," the tax court acknowledged there is no definition, only "illustrative examples." (ER–55.) It cited three as "pertinent" (ER–55-56), admitting they "address grass roots lobbying" not applicable "direct lobbying" (ER–55).[32] "Refers to" is unconstitutional for at least six reasons.

First, under the First-Amendment Mandate it is unconstitutional for lacking a *definition*. "Refers to" is as vague and subjective as *BMR*'s rejected language and as *Buckley*'s rejected "relative to" and "for the purpose of influencing," 424 U.S.

[32] *Grass-root lobbying* requires advocacy. *Direct lobbying* doesn't.

at 39-44, 78-81. And all risk "encompassing . . . issue discussion." *Id.* at 79.

Second, substituting *examples* for definition is unconstitutional for lacking required precision and failing IRS's First Amendment duty. *BMR*, 631 F.2d at 1040 ("burden involved in reformulating the definition of 'educational' to conform to First Amendment requirements" doesn't "warrant[] its avoidance").[33] The imprecision is evident in erroneous interpretations of examples shown next.

Third, the *first two examples* (here labeled *A* and *B*) cited (ER–55-56) take the vague approach rejected in *BMR*, *WRTL-II*, and *Buckley* absent a proper, narrow interpretation. But the court interpreted *A* and *B* broadly, allowing a mere words/topics-in-common approach. (ER–56-57.)

A says a communication refers to specific legislation where the phrase "President's plan for a drug-free America" "'ha[s] been widely used in connection with specific legislation . . . initially proposed by the President.'" (ER–55-56 (quoting 26 U.S.C. § 56.4911–2(b)(4)(ii)(B), Example 1).) "[W]idely used in connection" is not a free-floating test based on mere words/topics in common but is governed by

[33] IRS's post-*BMR* approach is like FEC's after *WRTL-II*. "[A]fter . . . *WRTL*[-*II*] adopted an objective 'appeal to vote' test . . . FEC adopted a two-part, 11-factor balancing test to implement *WRTL*[-*II*]'s ruling." *Citizens United*, 558 U.S. at 335 (citation omitted). "*WRTL*[-*II*] said that First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal. . . . Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests." *Id.* at 336 (quotation marks and citations omitted).

its context, requiring use of a phrase widely recognized as a *substitute* for legislation's name—such as "McCain-Feingold" for "Bipartisan Campaign Reform Act."

Example B does *not* refer to specific legislation, despite words/topics in common with anti-drug proposals because "'drug-free America' is . . . [not] widely identified with any . . . , nor does the organization support or oppose[34] a specific legislative proposal." (ER–56 (quoting 26 U.S.C. § 56.4911–2(b)(4)(ii)(A), Example 4).) So mere words/topics in common, absent a widely recognized *substitute* for the legislation's name, are not references to specific legislation.

A and B affirm that mere "[d]iscussion of issues cannot be [chilled] simply because the issues may also be pertinent in an election." *WRTL-II*, 551 U.S. at 470. "[R]efer[s] to" must be interpreted like FEC's "clearly identified" definition, 11 C.F.R. § 100.17, which only recognizes "unambiguous" substitutes for a "candidate," such as "the President."[35] Any contrary reading of A and B violates those examples and the First-Amendment Mandate.

Fourth, the court's third example, here labeled C (ER–56 (quoting 26 U.S.C. § 56.4911– 2(d)(1)(iii), Example 1)), referred to specific legislation because it spoke of "pending" "legislation" with specifically described content/effect, i.e.,

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[34] Note the advocacy requirement, essential to implement "attempt[] to influence," which requires an express-advocacy construction. *See supra* at 17-19.

[35] FEC's test is a matter-of-law test based on the words of the communication itself, in keeping with *WRTL-II*'s four-corners requirement. 551 U.S. at 469.

"[l]egislation that is pending in Congress would prohibit the use of this very dangerous pesticide." The proper interpretation is that C describes legislation so as to constitute a true *substitute* for legislation's name. But the court construed it broadly to capture messages that generally "describe[] the content or effect of the measure." (ER–57.) That violates C and the First-Amendment Mandate. And it allows IRS to chill BMR's feminist issue advocacy if an equal-rights measure is pending because its "content or effect" is about/advances feminism.

Fifth, examples A-C, are about inapplicable *grass-roots lobbying*, which has an *advocacy* requirement, i.e.,"encourag[ing] the recipient . . . to take action with respect to such legislation"—as the tax court said when noting there is *no* advocacy requirement for direct lobbying. (ER–50 n.38 (citing 26 C.F.R. § 56.4911–2(b)(2)(ii), (d)(1)(ii)).) But the Refer-Reference Test implements the statutory phrase "attempt[] to influence legislation," which requires the same express-advocacy as *Buckley*'s "purpose of influencing." *See supra* at 17-19. So a requirement that a communication expressly advocate *legislation*, not an *issue*, is essential to distinguish a cognizable influence-attempt from protected educational issue advocacy. Omitting the express-advocacy requirement impermissibly creates vagueness and overbreadth. Examples A-C turn on action-advocacy that is missing from the Refer-Reflect Test. Words of advocacy, i.e., an explicit *appeal* to the action of *voting*, was required in *Buckley*'s "express advocacy" test, applied to both "expendi-

ture . . . relative to" and "for the purpose of influencing," 424 U.S. at 42-44 & n.52, 77-81, as they were to this Court's express-advocacy test under *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), clarified by *California Pro-Life Counsel v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003), and to *WRTL-II*'s "appeal to vote" test, 551 U.S. at 469-70, 476. The missing advocacy requirement dooms the Refer-Relate Test as an interpretation of "attempt[] to influence *legislation*," 26 U.S.C. § 4945 (emphasis added), compliant with the First-Amendment Mandate. Attempts to influence *issues* cannot be chilled.

Sixth, the tax court's construction is unconstitutional: "[W]e hold that a communication 'refers to' a ballot measure within the meaning of the regulations if it either refers to the measure by name or, without naming it, employs terms widely used in connection with the measure or describes the content or effect of the measure." (ER–56-57.) Everything other than "by name" here violates both the First-Amendment Mandate and examples A-C for reasons just discussed.

The tax court exacerbated its unconstitutionally broad construction with an unprecedented, unconstitutional reliance on ballot-measure pamphlets (the "Ballot-Pamphlet Test") to say common words/topics exist in messages and measures, to say messages generally described content/effect, and to establish truth/distortion in messages (discussed below). Appellants had no notice from statutes, regulations, examples, or tax-court usage that an unconstitutional construc-

tion would apply and be decided on mere words/topics in common without IRS being required to show that messages used widely recognized *substitutes* for measures' names. The court further introduced the vagueness and latitude rejected in *BMR*. *See* Part I.

"Reflects a view" is similarly unconstitutional as an implementation of "attempt[] to influence" because, as discussed, *Buckley* held that an express-advocacy construction is required to save the similar "for the purpose of influencing." *BMR* struck precursors to the Methodology Test, 631 F.2d at 1036-37, based on "latitude" allowing "selective application." *Id.* But "reflects a view" provides latitude and allows selective application. IRS has made no effort to provide the "especially stringent . . . specificity" *BMR* say "is required" in this context, 631 F.2d at 1035, to comply with the First-Amendment Mandate.

Because the Refer-Reflect Test is "so vague as to violate the First Amendment and . . . application," *id.* at 1034-35, it should be held facially unconstitutional, and Foundation's messages cannot be deemed influence-attempts under it.

2. Under a Proper Construction of the Refer-Reflect Test, No Message Both "Refers to" and "Reflects a View on" a Ballot Measure.

Statutes "subject to a limiting construction" "should . . . [be] construe[d] . . . to avoid constitutional problems." *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982) (collecting cases). Under proper constructions of "attempt[] to influence

legislation," the Refer-Reflect Test, and examples A-C, no message is an influence-attempt.

A saving construction of examples A-C requires naming a measure or employing a widely recognized substitute for the official name, e.g., "McCain-Feingold" for "Bipartisan Campaign Reform Act." Describing "content and effect" requires language mentioning "legislation" (or "measure") and creating a clear substitute for its name, e.g., "the legislation that would restrict 'electioneering communications'" (McCain-Feingold). "[A]ttempt[] to influence" and the Refer-Reflect Test require the clearly-identified and express-advocacy constructions *Buckley* gave "for the purpose of influencing," 424 U.S. at 44, 80, so these phrases apply only to communications expressly advocating a vote for/against clearly identified ballot measures.[36] Under such constructions, most messages here don't "refer[] to" ballot measures. Those that do don't "reflect a view."

Message **1** (ER–19-20) talks about a *past* measure (Measure 17) mandating a prisoner-work program and how government officials stopped it and changed laws to reduce jail time, and it said voters didn't ask for "whiney excuses" about why they couldn't be heeded. It doesn't "refer[] to" a pending measure because it men-

[36] The alternative approach of defining an "electioneering-communication"-style framework to which a *WRTL-II* style "appeal to vote" test would be applied would be beyond the ability of a court in construing a statute because it would require adding elements to the regulatory scheme. *See supra* at 17 & note 28.

tions no measure by name, by widely recognized name substitute, or by mentioning "measure" with content/effect description creating a substitute. The tax court said it "refers to a pending measure because a ballot-measure pamphlet talked about Measure 49 reinstating a prisoner work program and the message "described the general content of Measure 49." (ER–57-58.) But mere commonality of words/topics is insufficient: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL-II*, 551 U.S. at 474. The tax court's standards and analysis are unconstitutional, as already shown, and under a proper saving construction Message 1 "refers to" no pending measure and there are no explicit words expressly advocating a vote for/against a clearly identified measure. This is no cognizable influence-attempt.

Messages **2** and **3** (ER–22-23) mention Measure 61, but neither expressly advocates a vote for/against it as required for a proper saving construction of "attempt[] to influence" and "reflects a view." The court said they "reflect a view" "because each posited that mandatory sentences would result in a reduction in crime in the same manner as had occurred after passage of an earlier measure." (ER–59.) That errs for four reasons. First, it imposes a constitutionally impermissible construction as discussed above. Second, while the messages say crime went down after a prior measure, they nowhere "posit" that it will go down with Measure 61. Third, the court's "positing" in the absence of express advocacy employs

a chilling "intent and effect" test forbidden in *Buckley*, 424 U.S. at 43, and *WRTL-II*, 551 U.S. at 469. Fourth, they simply say what Measure 61 would do, i.e., require mandatory sentences, so those opposed might oppose Measure 61 and those in favor might support it, but the messages expressly advocate neither. And even if they did "posit" that crime will go down, which they don't, that is not express advocacy of the a vote for/against a clearly identified measure. Rather, this is "[i]ssue advocacy[, which] conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *Id.* at 470. These are not cognizable influence-attempts.

Messages **4** and **5** (ER–25-27) speak of "administrative rules," but neither mentions a measure by name or widely recognized substitute. The court held that, by merely saying listeners will "hear a lot more about [administrative rules] in the weeks to come," the messages referenced Measure 65 due to election proximity and common words/topic. (ER–60.) Those words are not a widely recognized substitute for a measure, as required. IRS's example *B* (ER–56) says such mere common terms/topics are no "refer[ence]." Regarding election proximity, *WRTL-II* followed *Buckley*'s "influencing" construction by requiring that "the functional equivalent of express advocacy" be determined based on communications' words, not election proximity. 551 U.S. at 472-73. That controls. These are not cogniza-

ble influence-attempts.

Messages **6** and **7** (ER–29) mentions "split[ting] Measure 40 into 8 separate amendments to be approved by the voters." (ER–29.) The court said, by briefly describing Measure 40 and "amendments," the messages "describe[] the content and effect of Measures 69 through 75." (ER–61.) But the "amendments" are neither named nor described by widely recognized substitutes. While Measure 40 is briefly described as somehow about crime victims, amendments' contents are undescribed. Nor is their effect described except as perhaps somehow about criminals/victims. So these messages don't cognizably reference measures (and anyway the vague provisions are incapable of application to deem these messages as referencing measures). But assuming "refer[ence]" *arguendo*, the messages don't cognizably "reflect[] a view" on them. "Who would be against this?" could refer to splitting Measure 40 (immediate antecedent) or "fighting against the victims of crime" or "get[ting] tough on criminals" (possible preceding antecedents). The tax court relied on that question and the phrase "[t]he liberals and criminal defense attorneys." But those supporting liberals/attorneys (or their views) will applaud while those opposing won't. So this is "issue advocacy," with decisions up to hearers, not cognizable influence-attempts.

Message **8** (ER–30-31) was not held to reference legislation. (But the tax court erroneously found it non-educational.) This is no cognizable influence-attempt.

Message **9** (ER–34-35) says government tax *income* is growing faster than personal income and "Oregonians will soon be asked if they want to slow down the growth of their State government." The court said it referenced Measure 8 by "will soon be asked" and words in common and describing effect. (ER–63.) But that measure linked state *spending* (not *income*) to personal income (ER–33), and Message 9 nowhere named the measure nor employed a widely recognized substitute, so the tax court was in error. The court found "near-explicit support" for Measure 8 because "any reasonable observer would likely think [the growth rate] unsustainable." (ER–63-64.) But "near-explicit" is not the required "explicit words of advocacy of election or defeat." *Buckley*, 424 U.S. at 43. And this reliance on the *effect* on hearers employs an "intent and effect" test forbidden by *Buckley*, *id.* at 43-44, and *WRTL-II*, 551 U.S. at 467, because it "puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley*, 424 U.S. at 43. This is no cognizable influence-attempt.

Message **10** (ER–64) addressed the government growth-rate. The court found no influence-attempt because it addressed a retaliatory lawsuit against the speaker, cited inappropriate state expenditures, and lacked the "will soon be asked" phrase. The court relied on example *A* for "refers to" (ER–55), i.e., "the 'President's plan for a drug-free America' . . . should be passed" (ER–65). "Against that [express-

advocacy] benchmark," the "message falls short of 'reflect[ing] a view on' Measure 8." (ER–65.) Here the court finds the key—cognizable "attempt[s] to influence legislation" require express advocacy—but doesn't apply it consistently.

B. No Message May Be Deemed an Influence-Attempt or for a Nonexempt Function on the Ground It Is Non-Educational.

The messages may not be deemed influence-attempts or nonexempt expenditures on the ground they are non-educational because the "educational" test is unconstitutional and the messages are educational.[37]

1. The Methodology Test to Determine "Educational" Violates the First-Amendment Mandate and May Not Be Applied to Tax and Penalize.

BMR, binding on CIR, describes the First-Amendment Mandate that made IRS's former "educational" test so unconstitutional "as to defy . . . attempts to review its application . . . ." 631 F.2d at 1034-35. *BMR* rejected (inter alia) the following as permissible factors for "educational," *see supra* at 15-16:

- a fact/opinion distinction,
- an emotion/mind distinction, and
- a methodology test.

Despite *BMR*'s rejection of a *methodology* test, 631 F.2d at 1037 n.13, IRS

[37] Under 26 U.S.C. § 4945, influence-attempts are taxable unless for "making available the results of nonpartisan analysis, study, or research," § 4945(e), which "includes any activity that is 'educational' within the meaning of [26 C.F.R.] § 1.501(c)(3)– 1(d)(3)." 26 C.F.R. § 53.4945(2)(d). The Methodology Test determines "educational" for this exception and an exempt purpose. (Add.–35.)

instituted the *Methodology* Test to define "educational" for the "educational" exception to "attempt[ing] to influence legislation," 26 U.S.C. § 4945(e), and the exempt "educational" function, *id.* § 501(c)(3). And despite *BMR*'s rejection of *fact/opinion* and *emotion/mind* distinctions, 631 F.2d at 1038-39, IRS incorporated them in the unconstitutional **Methodology Test** (emphasis and numbering added):

> **.02** Although the Service renders no judgment as to the viewpoint or position of the organization, the Service will look to the method used by the organization to develop and present its views. The method used by the organization will not be considered educational if it fails to [***i***] *provide a factual foundation for the viewpoint or position being advocated*, or if it fails to [***ii***] *provide a development from the relevant facts that would materially aid a listener or reader in a learning process*.
>
> **.03** The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is not educational.
>
> **1** The [***iii***] *presentation of viewpoints or positions unsupported by facts* is a [***iv***] *significant portion of the organization's communications*.
>
> **2** The facts that purport to support the viewpoints or positions are [***v***] *distorted*.
>
> **3** The organization's presentations make [***vi***] *substantial* use of [***vii***] *inflammatory and disparaging terms* and express conclusions [***viii***] *more on the basis of strong emotional feelings than of objective evaluations*.
>
> **4** The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it [***ix***] *does not consider their background or training in the subject matter*.

(Add.–35.) The numbered, italicized, unconstitutional language is addressed next.

Paragraph .02 and Factor 1: Phrases *i*, *ii* & *iii*

Phrases ***i***, ***iii***, and ***iv***[38] violate the First-Amendment Mandate, *BMR*, 631 F.2d at

[38] Phrase ***ii*** (in Paragraph .02) is addressed *infra* at 35.

1034-40, e.g., allowing "latitude for subjective application," *id.* at 1034. As noted, *BMR* expressly rejected a fact-opinion distinction. Regarding ***i*** and ***iii***, *BMR* held unconstitutionally vague the near-identical phrase: "whether the facts underlying the conclusions are stated." *Id.* at 1038. *BMR* held that "distinguishing facts, on the one hand, and opinion or conclusion, on the other, doesn't provide an objective yardstick by which to define 'educational,'" so neither an organization nor IRS "will be able to judge when any given statement must be bolstered by another supporting statement." *Id.* Phrases ***i*** and ***iii*** substitute "viewpoint"/"position" for "conclusion" and "provide"/"unsupported" for "stated," which doesn't fix, and actually exacerbates, the unconstitutionality for four reasons.

First, viewpoints/positions are based on conclusions from facts, so still no objective yardstick distinguishes facts from viewpoints/positions/conclusions.

Second, in the present context, "conclusion" is actually much closer than "viewpoint"/"position" to what one reaches in "making available the results of nonpartisan analysis, study or research," 26 U.S.C. § 4945(e), so IRS is moving away from what it is supposed to be defining.

Third, authorizing IRS to opine whether *viewpoints* are factually based is an invitation to unconstitutional viewpoint discrimination with which *BMR* was concerned, i.e., on the "fact/opinion distinction," "one's answers will likely be colored by one's attitude toward the author's *point of view*." 631 F.2d at 1038 (emphasis

added). So substituting "viewpoint" for "conclusion" (which *BMR* found wanting) moves in the wrong direction.

Fourth, while *BMR* struck language merely requiring that facts be "stated" (akin to "provide" in ***i***), IRS now requires that they "support" what is asserted, which requires a judgment-call, allows IRS latitude, and fails to comply with *BMR*'s command that IRS not set itself up "to judge when any given statement must be bolstered by another supporting statement." 631 F.2d at 1038. So the problem of distinguishing facts and opinions remains, as does the problem of judging when one statement must be bolstered by another.

BMR noted IRS's application of the old "educational" test to this: "'we, as women, are inextricably bound up with each other in the struggle.'" *Id.* It said, "the author's viewpoint is not disguised in the last sentence. But is the statement one of fact or opinion?" *Id.* "If the latter," was the story of a plea deal forcing a woman "to choose between her own interests and those of other women" enough "basis" for the opinion, "[o]r is further proof of the existence of 'the struggle" necessary?" *Id.*[39] *BMR* rightly eschewed "[t]he futility of attempting to draw lines between fact and unsupported opinion," *id.*, but IRS does that in phrases ***i***, ***iii***, and ***iv***.

[39] Promoting a philosophy—from Platonism, to Marxism, to feminist theory—is "educational" though not fact-supported in ways subject to IRS determination. Plato speaks of ideal forms, Marx of class struggle, feminist theory of women's empowerment. But IRS has neither expertise nor constitutional authority to resolve whether each is supported by, requires, or distorts facts.

Regarding phrase ***iv***—"*significant portion of the organization's communications*"—both "significant portion" and "organization's communications" violate the First-Amendment Mandate.

First, "significant portion" is undefined, subject to IRS latitude. In the analogous context of "political committee" status, *Buckley* held it "need only encompass organizations . . . under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Both the "control" and "major purpose" lines are non-subjective, non-vague, with the latter subject to quick determination by asking if cognizable disbursements exceed 50% of total budget. But IRS's "significant portion" attempts no such "especially stringent . . . specificity," *BMR*, 631 F.2d at 135, though that is required to prevent chilling speech and because "laws are invalidated if they are 'wholly lacking in "terms susceptible of objective measurement,"'" *id.* (citations omitted).

Second, in the private-foundation context, where the issue is whether the expenditure for a *particular* communication is taxable, examining an "organization's communications" (plural) to determine "significant portion" is contrary to 26 U.S.C. § 4945(d)(1) and (e) and is an unconstitutionally subjective, vague, and overbroad violation of the First-Amendment Mandate. Even were "contributions" construed to include "contribution," a "significant portion" violates the First-Amendment Mandate as already discussed.

Paragraph .02: Phrase *ii*

Phrase ***ii***—"*development from the relevant facts that would materially aid a listener or reader in a learning process*—violates the First-Amendment Mandate. "[R]elevant facts" is like "pertinent facts," which *BMR* rejected. *Id.* at 1037. "[M]aterially aid" is like "useful to the individual" and "sufficient . . . to permit," which *BMR* rejected. *Id.* at 1036-37. These, along with "development"[40] and "learning process,"[41] are unconstitutional for violating the First-Amendment Mandate, e.g., allowing forbidden IRS latitude.

Factor 2: Phrase *v*

"The facts that purport to support the viewpoints or positions are [***v***] *distorted*" violates the First-Amendment Mandate, *BMR*, 631 F.2d at 1034-40, e.g., allowing "latitude for subjective application," *id.* at 1034. Allowing IRS agents to determine whether "facts . . . are distorted" suffers from essentially the same flaw as ***i*** and ***iii*** above, e.g., ignoring *BMR*'s declaration of "[t]he futility of attempting to draw lines between fact and unsupported opinion," *id.* at 1038. This Factor allows subjective attacking of the facts themselves. But IRS cannot be the truth-arbiter, just as it cannot "judge when any given statement must be bolstered by another sup-

[40] BMR's "bound up with each other in the struggle" viewpoint didn't "develop" (though the term is unclear) from the plea-agreement story, *id.* at 1038, but was asserted at the article's end as feminist issue advocacy.

[41] This means "educational," but *BMR* rejected using "educational" to define "educational." *Id.* at 1037 n.13.

porting statement," *id.* Government "truth" control goes to the First Amendment's core and origin, including forbidden "'taxes on knowledge,'" *id.* at 1034 (citation omitted), and Britain's prior-restraint licensing that *Citizens United* again eschewed, including a prior restraint disguised as a subjective, 11-factor, balancing test that FEC substituted for *WRTL-II*'s objective "appeal to vote" test, 558 U.S. at 335-36. This Factor doesn't even require finding truth/falsehood, only "distortion," which is undefined and an open invitation to IRS subjectivism and abuse.[42]

Factor 3: Phrases *vi*, *vii* & *viii*

Factor 3—"[t]he organization's presentations make [***vi***] *substantial* use of [***vii***] *inflammatory and disparaging terms* and express conclusions [***viii***] *more on the basis of strong emotional feelings than of objective evaluations*"—violates the First-Amendment Mandate, *BMR*, 631 F.2d at 1034-40, e.g., allowing "latitude for subjective application," *id.* at 1034. Regarding ***vi***, "substantial" is an open invitation to IRS latitude, and *BMR* expressly rejected the "quantitative approach" taken by ***vi*** and ***viii***. 631 F.2 at 1038-39.[43] Regarding ***vii*** and ***viii***, IRS does what *BMR*

[42] *See also* II.B.2 (First Amendment bars government as truth arbiter).

[43] "Substantial" allows no bright-line construction like *Buckley*'s major-purpose test. 424 U.S. at 79. *BMR* rejected an emotion/mind distinction because (inter alia) "it is unclear how much of a publication's content would have to be factual, or appeal to the mind," 631 F.2d at 1039, but "substantial" doesn't answer *BMR*'s how-much question, merely substituting one vagueness for another, and *BMR* rejected "substantial portion" of a communication to determine a speaker's "principal function," *id.* at 1037. The use of "more" in ***viii*** could be interpreted to require over 50%, but the emotion/mind distinction it governs is flatly forbidden by *BMR*,

forbade—rely on a "distinction[] between appeals to the emotions and . . . mind" and require the absence of "fervor" or "strength" in a communication. *Id.* at 1038-39.[44] *BMR* cited Cohen's "F*** the Draft" jacket to show "the emotional content of a word is an important component of its message," *id.* at 1039 (quoting *Cohen v. California*, 403 U.S. 15, 26 (1971)), and held emotion-laden, anti-cancer ads educational, *id.* IRS's approach is foreclosed by the First-Amendment Mandate and *BMR*. And *WRTL-II* cited *Cohen* in telling the government it cannot compel speakers to alter protected speech. 551 U.S. at 477 n.9.

Factor 4: Phrase *ix*

Factor 4—"The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it [***ix***] *does not consider their background or training in the subject matter*"—violates the First-Amendment Mandate, *BMR*, 631 F.2d at 1034-40, e.g., allowing "latitude for subjective application," *id.* at 1034.

But though this test is unconstitutional, it is *not* the test IRS uses. As the tax court noted, IRS "argues that . . . omission of 'background material' . . . is a violation of Factor 4." (ER–81.) So IRS interprets Factor 4 to require *provision* of

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so solving the "quantitative" flaw solves nothing.

[44] The substitution of "objective evaluations" in ***viii*** for "appeals to the mind" is meaningless because they mean the same when contrasted to either "appeal to the emotions" or "on the basis of strong emotional feelings." Merely including the word "objective" doesn't make this inherently subjective test objective.

(government-specified) *background information*, not the *consideration* of *hearers' background*, which Factor 4 requires. The tax court rejected IRS's interpretation in the cited context as "requir[ing] presentation of opposing views." (ER–81.) But elsewhere, the tax court held that "because neither message provides the listener this basic information," they violate Factor 4. (ER–76.) Because *considering* hearers' background doesn't require *providing* background information, both IRS and the tax court misstate what Factor 4 requires. And requiring government-specified "basic information" violates *BMR* and the First-Amendment Mandate.

BMR focused on this newsletter language: "'we, as women, are inextricably bound up with each other in the struggle,'" *id.* at 1038. BMR would have failed Factor 4 (and so not have been "educational") because no evidence was provided that BMR took account of readers' background/training in that statement (let alone the tax court's and IRS's distorted version of Factor 4). BMR simply asserted that feminist viewpoint at the end of an article about a plea bargain deemed coercive. But the article contained no discussion about the historical and philosophical background of feminism's historical waves (with different emphases). And there was no evidence of BMR's having researched the feminist background/training of readers. Mandating such demographic research before BMR could speak would be a forbidden tax on knowledge and prior restraint. And IRS intrusion to determine whether such demographic research took place before educational issue advocacy

occurred would trample the free-speech, free-association rights of ideological organizations. Must advocates of issues—from abortion to zoos—first do demographic research then tailor speech accordingly to do educational issue advocacy? No, the First Amendment forbids it. This factor reads like the product of a brainstorming session on desirable features of an ideal learning situation, with pedagogy tailored precisely to student need. Such tailoring perhaps happened when Aristotle taught Alexander in a Macedonian cave, but typically issue-advocacy groups just try to get their message out as best they can. Communications and groups may not be deemed non-educational based on this unconstitutional factor.

After *BMR* was decided, *National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983), noted that the district court below "concluded that the Methodology Test was itself vague and would not cure the faults of the regulation found in *Big Mama*." *Id.* at 870. The appellate court said some nice things about the Test's direction, but noted it yet "requires the exercise of judgment" with abuses to be cured by appeals, *id.* at 875-75, which is contrary to the First-Amendment Mandate and leaves educational issue advocacy chilled. Crucially, the court didn't reach the Test's constitutionality. *Id.* at 876.

Nationalist Movement v. CIR, 102 T.C. 558 (Tax Ct. 1994), upheld the Test, but key parts were not challenged, and the court didn't deal with the problems outlined above, which show that *BMR* expressly forbade the Methodology Test's ap-

proach. Rather, it merely proclaimed: "In our view [the Methodology Test] is not unconstitutionally vague or overbroad . . . [because] its provisions are sufficiently, understandable, specific, and objective both to preclude chilling . . . and to minimize arbitrary or discriminatory application . . . ." *Id.* at 588-89. And its justification for that conclusion was that "Petitioner has not persuaded us that either the purpose or effect of the [Methodology Test] is to suppress disfavored ideas." *Id.* at 589. But that evades *BMR*'s constitutional analysis, which placed the burden on the *government* to prove that IRS's "educational" definition doesn't violate the First-Amendment Mandate. *See* Part I. So the Methodology Test violates *BMR* and the First-Amendment Mandate despite these cases, and may not be applied to determine whether messages are educational.

2. In Applying the Methodology Test, the Tax Court Unconstitutionally Made the Government "the Arbiter of 'Truth.'"

"One of the concerns in this area, because of First Amendment considerations, is that the government must shun being the arbiter of 'truth.'" *National Alliance*, 710 F.2d at 873-74. Even where defamation and fraud are alleged, the First Amendment protects robust speech by requiring evidence establishing knowing falsehoods or reckless disregard for truth in public debate. *U.S. v. Alvarez*, 132 S.Ct. 2537, 2545 (2012) (collecting cases, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964)). In fact, *Alvarez* treated a statute barring "false claims" about

military honors as content-based, with the consequent presumption of invalidity and strict scrutiny. *Id.* at 2543-44.

Nonetheless, the tax court not only overlooked the unconstitutionality of a Methodology Test that makes the *IRS* the truth-arbiter, but the court itself violated the First Amendment by making government ballot pamphlets the truth-arbiter in applying the Methodology Test. Appellants had no notice of the court's intent to employ this Ballot-Pamphlet Test, so could not brief its unconstitutionality. The court recited government statements (ER–14-27) and used them to say messages referenced measures, based on terms in common (*see, e.g.*, ER–58) and "contain factual distortions" (ER–70). The court thereby created, without notice, an unprecedented Ballot-Pamphlet Test that unconstitutionally made government the truth-arbiter and is inherently vague and subject to arbitrary enforcement—all in violation of the First-Amendment Mandate. All tax-court holdings based on the Ballot-Pamphlet Test must be rejected, and especially any finding of "distortion."

An example from Message 1 (ER–19) illustrates the danger of government as truth-arbiter and the unconstitutional approach of the tax court and IRS. Central to Message 1 was Oregon's effort, in 1994's Measure 17, to require prisoners to work or take job training for 40 hours per week with any prisoner-earned compensation used for purposes in Article I, § 41(8):

(a) reimbursement for all or a portion of the costs of the inmate's rehabili-

> tation, housing, health care, and living costs; (b) restitution or compensation to the victims of the particular inmate's crime; (c) restitution or compensation to the victims of crime generally through a fund designed for that purpose; (d) financial support for immediate family of the inmate outside the corrections institution; and (e) payment of fines, court costs, and applicable taxes.

Message 1 says the Attorney General "said the federal government doesn't like the way Oregon pays it[]s prisoners." This accurately describes the Attorney General's opinion that if prison products move in interstate commerce (i.e., not within Oregon or to international markets) it might violate the Ashurst-Sumners Act (18 U.S.C. § 1776 (1994)), unless it fits certain exceptions for products to be used by government/nonprofits and in certified programs such as Federal Prison Industry Enhancement ("PIE"), which requires that prisoners keep at least 20% of compensation. 48 Or. Op. Atty. Gen. 134, 24-31 (Dec. 3, 1996).[45] Message 1 then said that "[Oregon's Attorney General] and the Governor have decided to shut down the program entirely" and "[i]f they really wanted prisoners to work, they'd just

[45] At every opportunity, the Opinion decided on "conservative[]" interpretations, being "inclined to conclude that [Measure 17] may make it difficult or impossible . . . to satisfy the requirements of the [Ashurst-Sumners] Act." *Id.* at 30. For example, it rejected interpretations of "reimbursements" and "rehabilitation" that would have allowed prisoners to spend some compensation on prison canteen items, *id.* at 33-37, thereby assuming that Oregon voters intended to enact a law in conflict with the commonly applicable federal PIE law in such a way as to warrant shutting down the program. But the usual presumption is that legislators don't intend to enact impractical/unconstitutional provisions, requiring appropriate constructions to avoid absurd results. *See, e.g.*, *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1327 (11th Cir. 2001) ("statute should be construed in a manner that avoids an absurd result")

change the way we . . . pay them." That plainly described the PIE 20% issue and said fixing, not terminating, the program was proper. And as may seen from the description above and the Attorney-General Opinion, Oregon clearly could have carried out the Measure-17 program in some fashion, without shutting it all down. So a full shutdown was at issue, along with the motives behind it.

Yet the tax court entirely ignored the central issues about how prisoners are paid and the full shutdown and said Message 1 "falsely" "distorts the facts" because the "explanatory statement" say the program was shut down "because of a conflict with Federal law" instead of "personal views" of officials." (ER–71-72.) The court unconstitutionally made itself the truth-arbiter (as did IRS) on a question of public policy clearly open to multiple views, all under the Methodology Test's authorization to probe "objective evaluations" and factual "distort[ions]." So that Test stands exposed as allowing IRS (and court) latitude in determining what is truth in public-policy debate, which the First Amendment forbids.

And the court's reliance on a Ballot-Pamphlet Test to establish truth concerning highly protected issue advocacy shows the unconstitutionality of that analysis. This is especially clear here, as the "explanatory statement" cited mentioned nothing about how prisoners were to be paid, whether that was subject to interpretation or correction, or the propriety of shutting down the whole program when it could have been operated in some fashion to simply avoid the recited "conflict."

"'[D]ebate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (1976) (quoting *New York Times*, 376 U.S. at 270). But that First Amendment liberty is gutted if issue-advocacy speakers must constantly watch over their shoulders for IRS agents using the subjective, vague, overbroad, non-speech-protective Methodology Test to rush in as the truth-arbiter and punish them for robust issue advocacy.

3. Under a Proper Construction, the Messages Are Educational.

Under a proper construction of "educational," Foundation's messages are educational and are not influence-attempts or non-exempt activity. As noted above, *BMR* expressly rejected an "educational" test based on purportedly educational "methods." 631 F.2d at 1037 n.13. *BMR* told IRS to create a non-subjective, non-vague, speech-protective test without IRS latitude, *id.* at 1040, not one based on what *BMR* rejected. The Methodology Test does what IRS rejected and may not be applied to tax/penalize educational issue advocates. Neither Appellants nor this Court need do IRS's neglected work, but it is useful to highlight what is forbidden and what might be more permissible.

Forbidden is an education-methodology approach, unconstitutional because (inter alia) (i) *how* people speak is protected by the First Amendment, (ii) methods vary by time, place, need, fad, culture, tradition, and (iii) "educational" turns on no method. Aristotle likely included Socratic dialogue in tutoring Alexander, along

with careful attention to Alexander's background/training in subject matters. But that doesn't mean a guest speaker on climate change in a university lecture series open to the public is not educating because he is not an academic, lectures, and knows nothing of hearers' background/training. BMR's newsletter was not non-educational because it just advocated feminism. Brief broadcast ads, often tugging heartstrings, suffice to educate the public. And authorizing the IRS to decide whether the climate-change lecturer appealed too much to emotion, used too inflammatory terms, was inadequately supported by facts, etc. is beyond the pale.

A more useful approach is to look at what sort of saving construction of "educational" would be required in *this* context.[46] *WRTL-II* defined issue advocacy as *inherently* educational: "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." 551 U.S. at 470. The lack of "invit[ation]," i.e., express advocacy of a political result, constitutionally makes issue advocacy *not* an influence-attempt under 26 U.S.C. § 4945. The tax court correctly admitted that the ultimate

[46] IRS's attempt to find a unified "educational" definition applicable to both the influence-attempt and exempt-function contexts may be as illusory as Einstein's unified-field-theory quest. What is an influence-attempt is readily resolved by the required clearly-identified and express-advocacy constructions, but an "educational" exempt function is arguably more complex, as *BMR* indicated, but it must be defined broadly and without IRS latitude under *BMR* to avoid IRS exclusion of groups (e.g., "tea party") disfavored by those currently in power.

issue in this context is the presence or absence of express-advocacy when it considered Message 10. *See supra* at 29-30. (ER–65.) So issue advocacy (without express advocacy) is both educational and not an influence-attempt. This is doubly so where issue advocacy is done by a speaker for whom IRS has already recognized § 501(c)(3) status, establishing that it inherently is an exempt-activity entity regularly doing exempt activity. At a minimum, under these factors the First Amendment requires that *IRS* bear the heavy burden of showing that issue advocacy by such entities is *not* educational (with all ties to the speaker, *WRTL-II*, 551 U.S. at 474). Under either approach, the messages are educational, so none is a cognizable influence-attempt or non-exempt activity.

Again Message 1 (ER–19-20) provides an example of public education (as do Foundation's other messages). It informs the public about facts concerning Measure 17's effort to require prisoners to work (including job training) for 40 hours per week. It says voters approved the requirement, the Attorney General found a federal-law conflict, the conflict involved how prisoners were paid, and the Attorney General and Governor shut down the whole program without effort to remedy how prisoners were paid (or to operate the program so as to avoid the conflict). And it effectively advocates an issue—prisoners should be involved in work or job training —with forceful humor about "whiney excuses," which will stay in hearers' minds better than dry fact-recitals. That is "educational," including true, im-

portant information totally absent from any government information cited by the tax court. And proximity to public consideration of Measure 49 is entirely appropriate because the best time to advocate an issue is when the issue is in the public consciousness. "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL-II*, 551 U.S. at 474.

III.

Parks Is Not Subject to Assessed Taxes.[47]

A. The Messages Are Not, Nor Could Be Known To Be, Taxable Expenditures.

26 U.S.C. § 4945(a)(2) imposes a tax on "the agreement of any foundation manager to . . . an expenditure, knowing that it is a taxable expenditure . . . unless such agreement is not willful and is due to reasonable cause."

As shown in Parts I-II, Foundation's messages are not taxable expenditures because they are educational issue advocacy. So they are neither influence-attempts nor non-exempt activity, and Mr. Parks may not be taxed for approving non-taxable messages.

Even were one deemed taxable, Mr. Parks is not liable because approval would have been within the exception for agreements that are non-knowing, non-willful, and for a reasonable cause. Appellants have, at a minimum, shown strong

[47] *Scrutiny level*: CIR bears the "especially stringent" burden of "First Amendment scrutiny," rejecting "latitude for subjective application." *See* Part I.

arguments for why no message is taxable, based on the First Amendment and *BMR*, which have been around since 1791 and 1980 respectively, long before Foundation's educational issue-advocacy messages. Those control now and controlled then, and they forbid regulation of speech, in this tax-exempt "educational" context, that violates the First-Amendment Mandate, i.e., is subjective, vague, non-speech-protective, and chills speech by allowing IRS-agent latitude. Based on those arguments and precedents, Park's agreement was not "knowing," "not willful[,] and is due to [the] reasonable cause" of believing the expenditures constitutionally protected and non-taxable. So Parks is not properly subject to this tax for authorizing them.

Note the tax court's undue reliance on "Stipulation of *Facts*" #71 (ER–158, 184 (emphasis added)) for a *legal* proposition (ER–88-89, 95-96). This case was submitted, by parties' motion, for resolution without trial on stipulated facts under Tax Court Rule 122, which allows this "where sufficient facts have been admitted, stipulated, established by deposition, or included in the record in some other way." So the role of the Stipulated Facts was to establish *facts*, not to limit or resolve *legal* arguments. As a matter of law, 26 U.S.C. § 4945(a)(2), specifies that foundation managers may be excused from tax liability based on action that is non-knowing, non-willful, or for reasonable cause. A subset of that is reliance on counsel advice, and a subset of counsel advice is the safe-harbor provisions of 26 C.F.R.

§ 53.4945–1(a)(2)(vi). So Stipulation 71 is a general *factual* statement that Parks is free of the tax penalty if the ads are educational or he relied on counsel advice, not a waiver of defenses expressly provided by statute. That was not the function of the Stipulation of Facts.

Even were this court inclined to deem fact Stipulation 71 a legal stipulation, that would not waive an important legal argument in a First Amendment case for the same reason that the Supreme Court held that appellant Citizens United did not waive a facial challenge even though it "stipulated to dismissing" a facial challenge, 558 U.S. at 329, because (inter alia):

> Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" Citizens United's argument that *Austin* [*v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990),] should be overruled is "not a new claim." Rather, it is—at most—"a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment."

330-31 (internal citations omitted).[48] Here, Parks and Foundation also have consistently claimed that the excise taxes imposed violate their First Amendment rights. So Parks is entitled to argue both that the messages were non-taxable under *BMR* and the First-Amendment Mandate and that the arguments for that position are

[48] This Court may also consider this important argument even if not considered below. *See supra note* 5.

sufficiently compelling to make his approval, at a minimum, non-knowing, non-willful, or for reasonable cause. So he is not liable on these bases.

B. Parks Properly Relied on Counsel Advice, and the Advice-of-Counsel Provision Is Unconstitutional if Construed Otherwise.

As noted above, reliance on counsel is a subset of the exception for non-knowing, non-willful, or for-reasonable-cause action, and a subset of counsel advice is the safe-harbor provisions of 26 C.F.R. § 53.4945–1(a)(2)(vi). Reliance on counsel advice is necessarily a broader concept than the specifics in the safe-harbor provision for counsel advice in the cited regulation. In other words, if a manager (or the manager's agent[49]) consults legal counsel, who says a communication is permissible (as happened here), then any authorization of a message is non-taxable because the authorization was non-knowing, non-willful, or for reasonable cause—whether or not it meets the safe-harbor "advice of counsel" specifications.

Under the safe-harbor provision, 26 C.F.R. § 53.4945–1(a)(2)(vi), foundation managers are protected if "after full disclosure of the factual situation to legal counsel . . . [they] rel[y] on the advice of such counsel expressed in a reasoned written legal opinion that an expenditure is not a taxable expenditure under § 4945 . . . ." 26 C.F.R. § 53.4945-1(a)(2)(vi). "[R]easoned written legal opinion" is unde-

[49] Any IRS argument that some counsel advice is non-cognizable because it was provided to Mr. Clapper, who produced the messages for Foundation, must be rejected because the tax court recognized Mr. Clapper as Mr. Parks's agent for producing the messages. (ER–13 n.7.)

fined and fails the First-Amendment Mandate, *see* Part I, for being subjective, vague, non-speech-protective, and subject to IRS latitude—all in violation of the "especially stringent . . . specificity" required in this issue-advocacy context, *BMR*, 631 F.2d at 103.

It also violates the First Amendment free-speech liberty for impermissibly burdening educational issue advocacy by requiring too much time and cost for legal advice to issue-advocacy groups. Requiring a written opinion is unwarranted, as it takes more time and money to obtain than a less-expensive spoken one, yet the latter is no less a legal opinion. Any perceived evidentiary advantage is an insufficient interest to justify that time and cost burden because evidence of reliance on advice of counsel can be established in other ways, e.g., by affidavits, production of a Power-Point presentation from an initial consultation, etc. Where multiple legal opinions are being considered, as here, they must be considered together. So if one shows detailed application of the law to the facts, that analytical depth must be assumed to be behind shorter legal opinions, as there is no justification to require the time and cost of a longer version every time. Clients should be able to call or email lawyers and get quick oral or written opinions and rely on those. Similarly, if a foundation manager sat down with a lawyer at the beginning of management to learn how things should be done, the information there imparted must be imputed to future advice communications without the time and cost of regurgitat-

ing old information. IRS's rule and application take no account of such considerations and thereby violate the First Amendment with unwarranted burdens.

Under a constitutionally permissible construction, Parks relied on reasoned written legal opinion. Consider analogous tax cases. The Accuracy-Related Penalties under 26 U.S.C. § 6662(a) and (b) for a substantial understatement of income tax also provide a reasonable-cause, good-faith exception. *Canal Corp. v. CIR*, 135 T.C. 199, 217 (2010). "Reasonable cause requires that the taxpayer have exercised ordinary business care and prudence as to the disputed item." *Neonatology Associates, P.A. v. CIR*, 115 T.C. 43, 98 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002). "The good faith reliance on the advice of an independent, competent professional as to the tax treatment of an item may meet this requirement." *Id.* For a taxpayer to reasonably rely on advice of counsel, the taxpayer must prove: "(1) The adviser was a competent professional who had sufficient expertise to justify reliance, (2) the taxpayer provided necessary and accurate information to the adviser, and (3) the taxpayer actually relied in good faith on the adviser's judgment." *Id.* at 99.

Parks relied on the legal advice of D. Charles Mauritz, who had competence and expertise. He was then an attorney at Davis Wright Tremaine LLP in the area of tax, but prior to joining the firm served five years with the IRS in Portland, Oregon. Mauritz is admitted to practice in the United States Tax Court and is a com-

petent professional in tax law.[50] So reliance on this counsel was justified. Parks or Clapper sent necessary information to Mauritz, i.e., texts of radio messages. Those texts themselves were the necessary information because they were the issue, so more was not required. After reviewing the messages in light of controlling law, Mauritz advised Parks of the law and Parks reasonably relied on the advice. (ER–286, 292, 294, 296, 304, 305.) All of the radio broadcasts revolved around the same tax law issues, so Mauritz did not need to restate the law in each communication, if the same law remains applicable law (as it did), because this would be unduly expensive to his client. Thus, the legal advice expressed in letters and e-mails should be considered as a whole. And Mauritz approved communications, advising that they fit within the educational exception to taxable expenditures. (*See* ER–292.) Parks is not a legal or tax expert and reasonably relied on his tax counsel's advice. Any other interpretation of advice of counsel violates the First Amendment.

Conclusion

Neither Foundation nor Parks is subject to imposed taxes, and challenged provisions are unconstitutional as challenged unless given the proper savings constructions described herein.

[50] *See, e.g.*, http://www.duffykekel.com/people/attorneys/d-charles-mauritz/.

Statement of Related Cases

Appellants know of no related cases.

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-72572,-73236

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Signature of Attorney or Unrepresented Litigant [s/ Richard E. Coleson] Date [Jan 25, 2017]

("s/" plus typed name is acceptable for electronically-filed documents)

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I certify that on January 25, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM-ECF system. I certify that all participants in the case are registered CM-ECF users and that service will be accomplished by the appellate CM/ECF system, which will notify the following (as listed on the docket):

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Addendum

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Addendum

Constitution

First Amendment, U.S. Const. amend. I
Congress shall make no law . . . abridging the freedom of speech . . . .

Statutes

26 U.S.C. § 501(a), (b), and (c)(3)
§ 501 - Exemption from tax on corporations, certain trusts, etc.

(a) *Exemption from taxation*

An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(b) *Tax on unrelated business income and certain other activities*

An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in parts II, III, and VI of this subchapter, but (notwithstanding parts II, III, and VI of this subchapter) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) *List of exempt organizations* The following organizations are referred to in subsection (a):

* * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. § 4945

§ 4945. Taxes on taxable expenditures

(a) *Initial taxes*.–

(1) *On the foundation.*–There is hereby imposed on each taxable expenditure (as defined in subsection (d)) a tax equal to 20 percent of the amount thereof. The tax imposed by this paragraph shall be paid by the private foundation.

(2) *On the management.*–There is hereby imposed on the agreement of any foundation manager to the making of an expenditure, knowing that it is a taxable expenditure, a tax equal to 5 percent of the amount thereof, unless such agreement is not willful and is due to reasonable cause. The tax imposed by this paragraph shall be paid by any foundation manager who agreed to the making of the expenditure.

(b) *Additional taxes.*–

(1) *On the foundation.*–In any case in which an initial tax is imposed by subsection (a)(1) on a taxable expenditure and such expenditure is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount of the expenditure. The tax imposed by this paragraph shall be paid by the private foundation.

(2) *On the management.*–In any case in which an additional tax is imposed by paragraph (1), if a foundation manager refused to agree to part or all of the correction, there is hereby imposed a tax equal to 50 percent of the amount of the taxable expenditure. The tax imposed by this paragraph shall be paid by any foundation manager who refused to agree to part or all of the correction.

(c) *Special rules.*–For purposes of subsections (a) and (b)--

(1) *Joint and several liability.*–If more than one person is liable under subsection (a)(2) or (b)(2) with respect to the making of a taxable expenditure, all such persons shall be jointly and severally liable under such paragraph with respect to such expenditure.

(2) *Limit for management.*–With respect to any one taxable expenditure, the maximum amount of the tax imposed by subsection (a)(2) shall not exceed $10,000, and the maximum amount of the tax imposed by subsection (b)(2) shall not exceed $20,000.

(d) *Taxable expenditure.*–For purposes of this section, the term "taxable expenditure" means any amount paid or incurred by a private foundation–

(1) to carry on propaganda, or otherwise to attempt, to influence legislation, within the meaning of subsection (e),

(2) except as provided in subsection (f), to influence the outcome of any

specific public election, or to carry on, directly or indirectly, any voter registration drive,

(3) as a grant to an individual for travel, study, or other similar purposes by such individual, unless such grant satisfies the requirements of subsection (g),

(4) as a grant to an organization unless–

* * *

or

(5) for any purpose other than one specified in section 170(c)(2)(B).

(e) *Activities within subsection (d)(1).*–For purposes of subsection (d)(1), the term "taxable expenditure" means any amount paid or incurred by a private foundation for–

(1) any attempt to influence any legislation through an attempt to affect the opinion of the general public or any segment thereof, and

(2) any attempt to influence legislation through communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation (except technical advice or assistance provided to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be),

other than through making available the results of nonpartisan analysis, study, or research. Paragraph (2) of this subsection shall not apply to any amount paid or incurred in connection with an appearance before, or communication to, any legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation.

* * *

(i) *Other definitions.*–For purposes of this section–

(1) *Correction.*–The terms "correction" and "correct" mean, with respect to any taxable expenditure, (A) recovering part or all of the expenditure to the extent recovery is possible, and where full recovery is not possible such additional corrective action as is prescribed by the Secretary by regulations, or (B) in the case of a failure to comply with subsection (h)(2) or (h)(3), obtaining or making the report in question.

(2) *Taxable period.*–The term "taxable period" means, with respect to any taxable expenditure, the period beginning with the date on which the taxable expenditure occurs and ending on the earlier of–

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a)(1) under section 6212, or

(B) the date on which the tax imposed by subsection (a)(1) is assessed.

Regulations & Interpretive Rule

26 C.F.R. § 1.501(c)(3)–1

§ 1.501(c)(3)–1 Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

* * *

(d) *Exempt purposes*—(1) *In general.* (i) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes:

(*a*) Religious,

(*b*) Charitable,

(*c*) Scientific,

(*d*) Testing for public safety,

(*e*) Literary,

(*f*) Educational, or

(*g*) Prevention of cruelty to children or animals.

(ii) An organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (i) of this subparagraph unless it serves a public rather than a private interest. Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.

(iii) *Examples.* The following examples illustrate the requirement of paragraph (d)(1)(ii) of this section that an organization serve a public rather than a private interest:

Example 1. (i) O is an educational organization the purpose of which is to study history and immigration. O's educational activities include sponsoring lectures and publishing a journal. The focus of O's historical studies is the genealogy of one family, tracing the descent of its present members. O actively solicits for

membership only individuals who are members of that one family. O's research is directed toward publishing a history of that family that will document the pedigrees of family members. A major objective of O's research is to identify and locate living descendants of that family to enable those descendants to become acquainted with each other.

(ii) O's educational activities primarily serve the private interests of members of a single family rather than a public interest. Therefore, O is operated for the benefit of private interests in violation of the restriction on private benefit in paragraph (d)(1)(ii) of this section. Based on these facts and circumstances, O is not operated exclusively for exempt purposes and, therefore, is not described in section 501(c)(3).

Example 2. (i) O is an art museum. O's principal activity is exhibiting art created by a group of unknown but promising local artists. O's activity, including organized tours of its art collection, promotes the arts. O is governed by a board of trustees unrelated to the artists whose work O exhibits. All of the art exhibited is offered for sale at prices set by the artist. Each artist whose work is exhibited has a consignment arrangement with O. Under this arrangement, when art is sold, the museum retains 10 percent of the selling price to cover the costs of operating the museum and gives the artist 90 percent.

(ii) The artists in this situation directly benefit from the exhibition and sale of their art. As a result, the principal activity of O serves the private interests of these artists. Because O gives 90 percent of the proceeds from its sole activity to the individual artists, the direct benefits to the artists are substantial and O's provision of these benefits to the artists is more than incidental to its other purposes and activities. This arrangement causes O to be operated for the benefit of private interests in violation of the restriction on private benefit in paragraph (d)(1)(ii) of this section. Based on these facts and circumstances, O is not operated exclusively for exempt purposes and, therefore, is not described in section 501(c)(3).

Example 3. (i) O is an educational organization the purpose of which is to train individuals in a program developed by P, O's president. The program is of interest to academics and professionals, representatives of whom serve on an advisory panel to O. All of the rights to the program are owned by Company K, a for-profit corporation owned by P. Prior to the existence of O, the teaching of the program was conducted by Company K. O licenses, from Company K, the right to conduct seminars and lectures on the program and to use the name of the program as part of O's name, in exchange for specified royalty payments. Under the license agreement, Company K provides O with the services of trainers and with course materials on the program. O may develop and copyright new course materials on the program but all such materials must be assigned to Company K without consideration

if and when the license agreement is terminated. Company K sets the tuition for the seminars and lectures on the program conducted by O. O has agreed not to become involved in any activity resembling the program or its implementation for 2 years after the termination of O's license agreement.

(ii) O's sole activity is conducting seminars and lectures on the program. This arrangement causes O to be operated for the benefit of P and Company K in violation of the restriction on private benefit in paragraph (d)(1)(ii) of this section, regardless of whether the royalty payments from O to Company K for the right to teach the program are reasonable. Based on these facts and circumstances, O is not operated exclusively for exempt purposes and, therefore, is not described in section 501(c)(3).

(iv) Since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. If, in fact, an organization is organized and operated exclusively for an exempt purpose or purposes, exemption will be granted to such an organization regardless of the purpose or purposes specified in its application for exemption. For example, if an organization claims exemption on the ground that it is educational, exemption will not be denied if, in fact, it is charitable.

(2) *Charitable defined.* The term charitable is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. The fact that an organization which is organized and operated for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily prevent such organization from being exempt as an organization organized and operated exclusively for charitable purposes. The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an action organization of any one of the types described in paragraph (c)(3) of this

section.

(3) *Educational defined*—(i) *In general.* The term educational, as used in section 501(c)(3), relates to:

(*a*) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(*b*) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) *Examples of educational organizations.* The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

Example 1. An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

Example 2. An organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs. Such programs may be on radio or television.

Example 3. An organization which presents a course of instruction by means of correspondence or through the utilization of television or radio.

Example 4. Museums, zoos, planetariums, symphony orchestras, and other similar organizations.

* * *

26 C.F.R. § 53.4945–1

§ 53.4945–1 Taxes on taxable expenditures.

(a) *Imposition of initial taxes*—(1) *Tax on private foundation.* Section 4945(a)(1) of the Code imposes an excise tax on each taxable expenditure (as defined in section 4945(d)) of a private foundation. This tax is to be paid by the private foundation and is at the rate of 10 percent of the amount of each taxable expenditure.

(2) *Tax on foundation manager*—(i) *In general.* Section 4945(a)(2) of the Code imposes, under certain circumstances, an excise tax on the agreement of any foundation manager to the making of a taxable expenditure by a private founda-

tion. This tax is imposed only in cases in which the following circumstances are present:

(a) A tax is imposed by section 4945(a)(1);

(b) Such foundation manager knows that the expenditure to which he agrees is a taxable expenditure, and

(c) Such agreement is willful and is not due to reasonable cause. However, the tax with respect to any particular expenditure applies only to the agreement of those foundation managers who are authorized to approve, or to exercise discretion in recommending approval of, the making of the expenditure by the foundation and to those foundation managers who are members of a group (such as the foundation's board of directors or trustees) which is so authorized. For the definition of the term foundation manager, see section 4946(b) and the regulations thereunder.

(ii) *Agreement.* The agreement of any foundation manager to the making of a taxable expenditure shall consist of any manifestation of approval of the expenditure which is sufficient to constitute an exercise of the foundation manager's authority to approve, or to exercise discretion in recommending approval of, the making of the expenditure by the foundation, whether or not such manifestation of approval is the final or decisive approval on behalf of the foundation.

(iii) *Knowing.* For purposes of section 4945, a foundation manager shall be considered to have agreed to an expenditure "knowing" that it is a taxable expenditure only if:

(a) He has actual knowledge of sufficient facts so that, based solely upon such facts, such expenditure would be a taxable expenditure,

(b) He is aware that such an expenditure under these circumstances may violate the provisions of federal tax law governing taxable expenditures, and

(c) He negligently fails to make reasonable attempts to ascertain whether the expenditure is a taxable expenditure, or he is in fact aware that it is such an expenditure. For purposes of this part and Chapter 42, the term knowing does not mean "having reason to know". However, evidence tending to show that a foundation manager has reason to know of a particular fact or particular rule is relevant in determining whether he had actual knowledge of such fact or rule. Thus, for example, evidence tending to show that a foundation manager has reason to know of sufficient facts so that, based solely upon such facts, an expenditure would be a taxable expenditure is relevant in determining whether he has actual knowledge of such facts.

(iv) *Willful.* A foundation manager's agreement to a taxable expenditure is willful if it is voluntary, conscious, and intentional. No motive to avoid the restrictions of the law or the incurrence of any tax is necessary to make an agreement

willful. However, a foundation manager's agreement to a taxable expenditure is not willful if he does not know that it is a taxable expenditure.

(v) *Due to reasonable cause.* A foundation manager's actions are due to reasonable cause if he has exercised his responsibility on behalf of the foundation with ordinary business care and prudence.

(vi) *Advice of counsel.* If a foundation manager, after full disclosure of the factual situation to legal counsel (including house counsel), relies on the advice of such counsel expressed in a reasoned written legal opinion that an expenditure is not a taxable expenditure under section 4945 (or that expenditures conforming to certain guidelines are not taxable expenditures), although such expenditure is subsequently held to be a taxable expenditure (or that certain proposed reporting procedures with respect to an expenditure will satisfy the tests of section 4945(h), although such procedures are subsequently held not to satisfy such section), the foundation manager's agreement to such expenditure (or to grants made with provision for such reporting procedures which are taxable solely because of such inadequate reporting procedures) will ordinarily not be considered "knowing" or "willful" and will ordinarily be considered "due to reasonable cause" within the meaning of section 4945(a)(2). For purposes of the subdivision, a written legal opinion will be considered "reasoned" even if it reaches a conclusion which is subsequently determined to be incorrect so long as such opinion addresses itself to the facts and applicable law. However, a written legal opinion will not be considered "reasoned" if it does nothing more than recite the facts and express a conclusion. However, the absence of advice of counsel with respect to an expenditure shall not, by itself, give rise to any inference that a foundation manager agreed to the making of the expenditure knowingly, willfully, or without reasonable cause.
(vii) Rate and incidence of tax. The tax imposed under section 4945(a)(2) is at the rate of 2 ½ percent of the amount of each taxable expenditure to which the foundation manager has agreed. This tax shall be paid by the foundation manager.
(viii) Cross reference. For provisions relating to the burden of proof in cases involving the issue whether a foundation manager has knowingly agreed to the making of a taxable expenditure, see section 7454(b).

(b) *Imposition of additional taxes*—(1) *Tax on private foundation.* Section 4945(b)(1) of the Code imposes an excise tax in any case in which an initial tax is imposed under section 4945(a)(1) on a taxable expenditure of a private foundation and the expenditure is not corrected within the taxable period (as defined in section 4945(i)(2)). The tax imposed under section 4945(b)(1) is to be paid by the private foundation and is at the rate of 100 percent of the amount of each taxable expenditure.

(2) *Tax on foundation manager.* Section 4945(b)(2) of the Code imposes an

excise tax in any case in which a tax is imposed under section 4945(b)(1) and a foundation manager has refused to agree to part or all of the correction of the taxable expenditure. The tax imposed under section 4945(b)(2) is at the rate of 50 percent of the amount of the taxable expenditure. This tax is to be paid by any foundation manager who has refused to agree to part or all of the correction of the taxable expenditure.

(c) *Special rules*—(1) *Joint and several liability.* In any case where more than one foundation manager is liable for tax imposed under section 4945 (a)(2) or (b)(2) with respect to the making of a taxable expenditure, all such foundation managers shall be jointly and severally liable for the tax imposed under such paragraph with respect to such taxable expenditure.

(2) *Limits on liability for management.* The maximum aggregate amount of tax collectible under section 4945(a)(2) from all foundation managers with respect to any one taxable expenditure shall be $5,000, and the maximum aggregate amount of tax collectible under section 4945(b)(2) from all foundation managers with respect to any one taxable expenditure shall be $10,000.

(3) *Examples.* The provisions of this paragraph may be illustrated by the following examples: *Example 1.* A, B, and C comprise the board of directors of Foundation M. They vote unanimously in favor of a grant of $100,000 to D, a business associate of each of the directors. The grant is to be used by D for travel and educational purposes and is not made in accordance with the requirements of section 4945(g). Each director knows that D was selected as the recipient of the grant solely because of his friendship with the directors and is aware that some grants made for travel, study, or other similar purposes may be taxable expenditures. Also, none of the directors makes any attempt to consult counsel, or to otherwise determine, whether this grant is a taxable expenditure. Initial taxes are imposed under paragraphs (1) and (2) of section 4945(a). The tax to be paid by the foundation is $10,000 (10 percent of $100,000). The tax to be paid by the board of directors is $2,500 (2 ½ percent of $100,000). A, B, and C are jointly and severally liable for this $2,500 and this sum may be collected by the Service from any one of them.

Example 2. Assume the same facts as in example (1). Further assume that within the taxable period A makes a motion to correct the taxable expenditure at a meeting of the board of directors. The motion is defeated by a two-to-one vote, A voting for the motion and B and C voting against it. In these circumstances an additional tax is imposed on the private foundation in the amount of $100,000 (100 percent of $100,000). The additional tax imposed on B and C is $10,000 (50 percent of $100,000 subject to a maximum of $10,000). B and C are jointly and severally liable for the $10,000, and this sum may be collected by the Service from ei-

ther of them.

(d) *Correction*—(1) *In general.* Except as provided in paragraph (d)(2) or (3) of this paragraph, correction of a taxable expenditure shall be accomplished by recovering part or all of the expenditure to the extent recovery is possible, and, where full recovery cannot be accomplished, by any additional corrective action which the Commissioner may prescribe. Such additional corrective action is to be determined by the circumstances of each particular case and may include the following:

(i) Requiring that any unpaid funds due the grantee be withheld;

(ii) Requiring that no further grants be made to the particular grantee;

(iii) In addition to other reports that are required, requiring periodic (e.g., quarterly) reports from the foundation with respect to all expenditures of the foundation (such reports shall be equivalent in detail to the reports required by section 4945(h)(3) and § 53.4945–5(d));

(iv) Requiring improved methods of exercising expenditure responsibility;

(v) Requiring improved methods of selecting recipients of individual grants; and

(vi) Requiring such other measures as the Commissioner may prescribe in a particular case. The foundation making the expenditure shall not be under any obligation to attempt to recover the expenditure by legal action if such action would in all probability not result in the satisfaction of execution on a judgment.

(2) *Correction for inadequate reporting.* If the expenditure is taxable only because of a failure to obtain a full and complete report as required by section 4945(h)(2) or because of a failure to make a full and detailed report as required by section 4945(h)(3), correction may be accomplished by obtaining or making the report in question. In addition, if the expenditure is taxable only because of a failure to obtain a full and complete report as required by section 4945(h)(2) and an investigation indicates that no grant funds have been diverted to any use not in furtherance of a purpose specified in the grant, correction may be accomplished by exerting all reasonable efforts to obtain the report in question and reporting the failure to the Internal Revenue Service, even though the report is not finally obtained.

(3) *Correction for failure to obtain advance approval.* Where an expenditure is taxable under section 4945(d)(3) only because of a failure to obtain advance approval of procedures with respect to grants as required by section 4945(g), correction may be accomplished by obtaining approval of the grant making procedures and establishing to the satisfaction of the Commissioner that:

(i) No grant funds have been diverted to any use not in furtherance of a purpose specified in the grant;

(ii) The grant making procedures instituted would have been approved if advance approval of such procedures had been properly requested; and

(iii) Where advance approval of grant making procedures is subsequently required, such approval will be properly requested.

(e) *Certain periods*—(1) *Taxable period.* For purposes of section 4945, the term "taxable period" means, with respect to any taxable expenditure, the period beginning with the date on which the taxable expenditure occurs and ending on the earlier of:

(i) The date of mailing of a notice of deficiency under section 6212 with respect to the tax imposed on taxable expenditures by section 4945(a)(1); or

(ii) The date on which the tax imposed by section 4945(a)(1) is assessed.

(2) *Cross reference.* For rules relating to taxable events that are corrected within the correction period, defined in section 4963(e), see section 4961(a) and the regulations thereunder.

26 C.F.R. § 56.4911-2

§ 56.4911-2 Lobbying expenditures, direct lobbying communications, and grass roots lobbying communications.

(a) *Lobbying expenditures*-(1) *In general.* An electing public charity's lobbying expenditures for a year are the sum of its expenditures during that year for direct lobbying communications ("direct lobbying expenditures") plus its expenditures during that year for grass roots lobbying communications ("grass roots expenditures").

(2) *Overview of § 56.4911-2 and the definitions of "direct lobbying communication" and "grass roots lobbying communication".* Paragraph (b)(1) of this section defines the term "direct lobbying communication." Paragraph (b)(2) of this section provides the general definition of the term "grass roots lobbying communication." (But also see paragraph (b)(5) of this section (special rebuttable presumption regarding certain paid mass media communications) and § 56.4911-5 (special, more lenient, definitions for certain communications from an electing public charity to its bona fide members)). Paragraph (b)(3) of this section lists and cross-references various exceptions to the definitions set forth in paragraphs (b)(1) and (2) (the text of the exceptions, along with relevant definitions and examples, is generally set forth in paragraph (c)). Paragraph (b)(4) of this section contains numerous examples illustrating the application of paragraphs (b)(1), (2) and (3). As mentioned above, paragraph (b)(5) of this section sets forth the special rebuttable presumption regarding a limited number of paid mass media communications about highly publicized legislation. Paragraph (d) of this section contains

definitions of (and examples illustrating) various terms used in this section.

(b) *Influencing legislation: direct and grass roots lobbying communications defined*-(1) *Direct lobbying communication*-(i) *Definition.* A direct lobbying communication is any attempt to influence any legislation through communication with:

(A) Any member or employee of a legislative body; or

(B) Any government official or employee (other than a member or employee of a legislative body) who may participate in the formulation of the legislation, but only if the principal purpose of the communication is to influence legislation.

(ii) *Required elements.* A communication with a legislator or government official will be treated as a direct lobbying communication under this § 56.4911-2(b)(1) if, but only if, the communication:

(A) Refers to specific legislation (see paragraph (d)(1) of this section for a definition of the term "specific legislation"); and

(B) Reflects a view on such legislation.

(iii) *Special rule for referenda, ballot initiatives or similar procedures.* Solely for purposes of this section 4911, where a communication refers to and reflects a view on a measure that is the subject of a referendum, ballot initiative or similar procedure, the general public in the State or locality where the vote will take place constitutes the legislative body, and individual members of the general public area, for purposes of this paragraph (b)(1), legislators. Accordingly, if such a communication is made to one or more members of the general public in that state or locality, the communication is a direct lobbying communication (unless it is nonpartisan analysis, study or research (see paragraph (c)(1) of this section).

(2) *Grass roots lobbying communication*-(i) *Definition.* A grass roots lobbying communication is any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.

(ii) *Required elements.* A communication will be treated as a grass roots lobbying communication under this § 56.4911-2(b)(2)(ii) if, but only if, the communication:

(A) Refers to specific legislation (see paragraph (d)(1) of this section for a definition of the term "specific legislation");

(B) Reflects a view on such legislation; and

(C) Encourages the recipient of the communication to take action with respect to such legislation (see paragraph (b)(2)(iii) of this section for the definition of encouraging the recipient to take action. For special, more lenient rules regarding an organization's communications directed only or primarily to bona fide members of the organization, see § 56.4911-5. For special rules regarding certain paid mass media advertisements about highly publicized legislation, see paragraph (b)(5) of

this section. For special rules regarding lobbying on referenda, ballot initiatives and similar procedures, see paragraph (b)(1)(iii) of this section).

(iii) *Definition of encouraging recipient to take action.* For purposes of this section, encouraging a recipient to take action with respect to legislation means that the communication:

(A) States that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact with the government official or employee is to influence legislation);

(B) States the address, telephone number, or similar information of a legislator or an employee of a legislative body;

(C) Provides a petition, tear-off postcard or similar material for the recipient to communicate with a legislator or an employee of a legislative body, or with any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of so facilitating contact with the government official or employee is to influence legislation); or

(D) Specifically identifies one or more legislators who will vote on the legislation as: opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation. Encouraging the recipient to take action under this paragraph (b)(2)(iii)(D) does not include naming the main sponsor(s) of the legislation for purposes of identifying the legislation.

(iv) *Definition of directly encouraging recipient to take action.* Communications described in one or more of paragraphs (b)(2)(iii) (A) through (C) of this section not only "encourage," but also "directly encourage" the recipient to take action with respect to legislation. Communications described in paragraph (b)(2)(iii)(D) of this section, however, do not directly encourage the recipient to take action with respect to legislation. Thus, a communication would encourage the recipient to take action with respect to legislation, but not directly encourage such action, if the communication does no more than identify one or more legislators who will vote on the legislation as: opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation. Communications that encourage the recipient to take action with respect to legislation but that do not directly encourage the recipient to take action with respect to legislation may be within the exception for nonpartisan analysis, study or research (see paragraph

(c)(1) of this section) and thus not be grass roots lobbying communications.

(v) *Subsequent lobbying use of nonlobbying communications or research materials*-(A) *Limited effect of application.* Even though certain communications or research materials are initially not grass roots lobbying communications under the general definition set forth in paragraph (b)(2)(ii) of this section, subsequent use of the communications or research materials for grass roots lobbying may cause them to be treated as grass roots lobbying communications. This paragraph (b)(2)(v) does not cause any communications or research materials to be considered direct lobbying communications.

(B) *Limited scope of application.* Under this paragraph (b)(2)(v), only "advocacy communications or research materials" are potentially treated as grass roots lobbying communications. Communications or research materials that are not "advocacy communications or research materials" are not treated as grass roots lobbying communications under this paragraph (b)(2)(v). "Advocacy communications or research materials" are any communications or materials that both refer to and reflect a view on specific legislation but that do not, in their initial format, contain a direct encouragement for recipients to take action with respect to legislation.

(C) *Subsequent use in lobbying.* Where advocacy communications or research materials are subsequently accompanied by a direct encouragement for recipients to take action with respect to legislation, the advocacy communications or research materials themselves are treated as grass roots lobbying communications unless the organization's primary purpose in undertaking or preparing the advocacy communications or research materials was not for use in lobbying. In such a case, all expenses of preparing and distributing the advocacy communications or research materials will be treated as grass roots expenditures.

(D) *Time limit on application of subsequent use rule.* The characterization of expenditures as grass roots lobbying expenditures under paragraph (b)(2)(v)(C) shall apply only to expenditures paid less than six months before the first use of the advocacy communications or research materials with a direct encouragement to action.

(E) *Safe harbor in determining "primary purpose".* The primary purpose of the organization in undertaking or preparing advocacy communications or research materials will not be considered to be for use in lobbying if, prior to or contemporaneously with the use of the advocacy communications or research materials with the direct encouragement to action, the organization makes a substantial nonlobbying distribution of the advocacy communications or research materials (without the direct encouragement to action). Whether a distribution is substantial will be determined by reference to all of the facts and circumstances, including the normal distribution pattern of similar nonpartisan analyses, studies or research by

that and similar organizations.

(F) *Special rule for partisan analysis, study or research.* In the case of advocacy communications or research materials that are not nonpartisan analysis, study or research, the nonlobbying distribution thereof will not be considered "substantial" unless that distribution is at least as extensive as the lobbying distribution thereof.

(G) *Factors considered in determining primary purpose.* Where the nonlobbying distribution of advocacy communications or research materials is not substantial, all of the facts and circumstances must be weighed to determine whether the organization's primary purpose in preparing the advocacy communications or research materials was for use in lobbying. While not the only factor, the extent of the organization's nonlobbying distribution of the advocacy communications or research materials is particularly relevant, especially when compared to the extent of their distribution with the direct encouragement to action. Another particularly relevant factor is whether the lobbying use of the advocacy communications or research materials is by the organization that prepared the document, a related organization, or an unrelated organization. Where the subsequent lobbying distribution is made by an unrelated organization, clear and convincing evidence (which must include evidence demonstrating cooperation or collusion between the two organizations) will be required to establish that the primary purpose for preparing the communication for use in lobbying.

(H) *Examples.* The provisions of this paragraph (b)(2)(v) are illustrated by the following examples: *Example 1.* Assume a nonlobbying "report" (that is not nonpartisan analysis, study or research) is prepared by an organization, but distributed to only 50 people. The report, in that format, refers to and reflects a view on specific legislation but does not contain a direct encouragement for the recipients to take action with respect to legislation. Two months later, the organization sends the report to 10,000 people along with a letter urging recipients to write their Senators about the legislation discussed in the report. Because the report's nonlobbying distribution is not as extensive as its lobbying distribution, the report's nonlobbying distribution is not substantial for purposes of this paragraph (b)(2)(v). Accordingly, the organization's primary purpose in preparing the report must be determined by weighing all of the facts and circumstances. In light of the relatively minimal nonlobbying distribution and the fact that the lobbying distribution is by the preparing organization rather than by an unrelated organization, and in the absence of evidence to the contrary, both the report and the letter are grass roots lobbying communications. Assume that all costs of preparing the report were paid within the six months preceding the mailing of the letter. Accordingly, all of the organization's expenditures for preparing and mailing the two documents are

grass roots lobbying expenditures.

Example 2. Assume the same facts as in Example (1), except that the costs of the report are paid over the two month period of January and February. Between January 1 and 31, the organization pays $1,000 for the report. In February, the organization pays $500 for the report. Further assume that the report is first used with a direct encouragement to action on August 1. Six months prior to August 1 is February 1. Accordingly, no costs paid for the report before February 1 are treated as grass roots lobbying expenditures under the subsequent use rule. Under these facts, the subsequent use rule treats only the $500 paid for the report in February as grass roots lobbying expenditures.

(3) *Exceptions to the definition of influencing legislation.* In many cases, a communication is not a direct or grass roots lobbying communication under paragraph (b)(1) or (b)(2) of this section if it falls within one of the exceptions listed in paragraph (c) of this section. See paragraph (c)(1), Nonpartisan analysis, study or research; paragraph (c)(2), Examinations and discussions of broad social, economic and similar problems; paragraph (c)(3), Requests for technical advice; and paragraph (c)(4), Communications pertaining to self-defense by the organization. In addition, see § 56.4911-5, which provides special rules regarding the treatment of certain lobbying communications directed in whole or in part to members of an electing public charity.

(4) *Examples.* This paragraph (b)(4) provides examples to illustrate the rules set forth in the section regarding direct and grass roots lobbying. The expenditure test election under section 501(h) is assumed to be in effect for all organizations discussed in the examples in this paragraph (b)(4). In addition, it is assumed that the special rules of § 56.4911-5, regarding certain of a public charity's communications with its members, do not apply to any of the examples in this paragraph (b)(4).

(i) *Direct lobbying.* The provisions of this section regarding direct lobbying communications are illustrated by the following examples:

Example 1. Organization P's employee, X, is assigned to approach members of Congress to gain their support for a pending bill. X drafts and P prints a position letter on the bill. P distributes the letter to members of Congress. Additionally, X personally contacts several members of Congress or their staffs to seek support for P's position on the bill. The letter and the personal contacts are direct lobbying communications.

Example 2. Organization M's president writes a letter to the Congresswoman representing the district in which M is headquartered, requesting that the Congresswoman write an administrative agency regarding proposed regulations recently published by that agency. M's president also requests that the Congress-

woman's letter to the agency state the Congresswoman's support of M's application for a particular type of permit granted by the agency. The letter written by M's president is not a direct lobbying communication.

Example 3. Organization Z prepares a paper on a particular state's environmental problems. The paper does not reflect a view on any specific pending legislation or on any specific legislative proposal that Z either supports or opposes. Z's representatives give the paper to a state legislator. Z's paper is not a direct lobbying communication.

Example 4. State X enacts a statute that requires the licensing of all day care providers. Agency B in State X is charged with preparing rules to implement the bill enacted by State X. One week after enactment of the bill, organization C sends a letter to Agency B providing detailed proposed rules that organization C suggests to Agency B as the appropriate standards to follow in implementing the statute on licensing of day care providers. Organization C's letter to Agency B is not a lobbying communication.

Example 5. Organization B researches, prepares and prints a code of standards of minimum safety requirements in an area of common electrical wiring. Organization B sells the code of standards booklet to the public and it is widely used by professional in the installation of electrical wiring. A number of states have codified all, or part, of the code of standards as mandatory safety standards. On occasion, B lobbies state legislators for passage of the code of standards for safety reasons. Because the primary purpose of preparing the code of standards was the promotion of public safety and the standards were specifically used in a profession for that purpose, separate from any legislative requirement, the research, preparation, printing and public distribution of the code of standards is not an expenditure for a direct (or grass roots) lobbying communication. Costs, such as transportation, photocopying, and other similar expenses, incurred in lobbying state legislators for passage of the code of standards into law are expenditures for direct lobbying communications.

Example 6. On the organization's own initiative, representatives of Organization F present written testimony to a Congressional committee. The news media report on the testimony of Organization F, detailing F's opposition to a pending bill. The testimony is a direct lobbying communication but is not a grass roots lobbying communication.

Example 7. Organization R's monthly newsletter contains an editorial column that refers to and reflects a view on specific pending bills. R sends the newsletter to 10,000 nonmember subscribers. Senator Doe is among the subscribers. The editorial column in the newsletter copy sent to Senator Doe is not a direct lobbying communication because the newsletter is sent to Senator Doe in her capacity as a

subscriber rather than her capacity as a legislator. (Note, though, that the editorial column may be a grass roots lobbying communication if it encourages recipients to take action with respect to the pending bills it refers to and on which it reflects a view).

Example 8. Assume the same facts as in Example (7), except that one of Senator Doe's staff members sees Senator Doe's copy of the editorial and writes to R requesting additional information. R responds with a letter that refers to and reflects a view on specific legislation. R's letter is a direct lobbying communication unless it is within one of the exceptions set forth in paragraph (c) of this section (such as the exception for nonpartisan analysis, study or research). (R's letter is not within the scope of the exception for responses to written requests from a legislative body or committee for technical advice (see paragraph (c)(3) of this section) because the letter is not in response to a written request from a legislative body or committee).

(ii) *Grass roots lobbying.* The provisions of this section regarding grass roots lobbying communications are illustrated in paragraph (b)(4)(ii)(A) of this section by examples of communications that are not grass roots lobbying communications and in paragraph (b)(4)(ii)(B) by examples of communications that are grass roots lobbying communications. The provisions of this section are further illustrated in paragraph (b)(4)(ii)(C), with particular regard to the exception for nonpartisan analysis, study, or research:

(A) *Communications that are not grass roots lobbying communications.*

Example 1. Organization L places in its newsletter an article that asserts that lack of new capital is hurting State W's economy. The article recommends that State W residents either invest more in local businesses or increase their savings so that funds will be available to others interested in making investments. The article is an attempt to influence opinions with respect to a general problem that might receive legislative attention and is distributed in a manner so as to reach and influence many individuals. However, the article does not refer to specific legislation that is pending in a legislative body, nor does the article refer to a specific legislative proposal the organization either supports or opposes. The article is not a grass roots lobbying communication.

Example 2. Assume the same facts as Example (1), except that the article refers to a bill pending in State W's legislature that is intended to provide tax incentives for private savings. The article praises the pending bill and recommends that it be enacted. However, the article does not encourage readers to take action with respect to the legislation. The article is not a grass roots lobbying communication.

Example 3. Organization B sends a letter to all persons on its mailing list. The letter includes an update on numerous environmental issues with a discussion of

general concerns regarding pollution, proposed federal regulations affecting the area, and several pending legislative proposals. The letter endorses two pending bills and opposes another pending bill, but does not name any legislator involved (other than the sponsor of one bill, for purposes of identifying the bill), nor does it otherwise encourage the reader to take action with respect to the legislation. The letter is not a grass roots lobbying communication.

Example 4. A pamphlet distributed by organization Z discusses the dangers of drugs and encourages the public to send their legislators a coupon, printed with the statement "I support a drug-free America." The term "drug-free America" is not widely identified with any of the many specific pending legislative proposals regarding drug issues. The pamphlet does not refer to any of the numerous pending legislative proposals, nor does the organization support or oppose a specific legislative proposal. The pamphlet is not a grass roots lobbying communication.

Example 5. A pamphlet distributed by organization B encourages readers to join an organization and "get involved in the fight against drugs." The text states, in the course of a discussion of several current drug issues, that organization B supports a specific bill before Congress that would establish an expanded drug control program. The pamphlet does not encourage readers to communicate with legislators about the bill (such as by including the names of undecided or opposed legislators). The pamphlet is not a grass roots lobbying communication.

Example 6. Organization E, an environmental organization, routinely summarizes in each edition of its newsletter the new environment-related bills that have been introduced in Congress since the last edition of the newsletter. The newsletter identifies each bill by a bill number and the name of the legislation's sponsor. The newsletter also reports on the status of previously introduced environment-related bills. The summaries and status reports do not encourage recipients of the newsletter to take action with respect to legislation, as described in paragraphs (b)(2)(iii) (A) through (D) of this section. Although the summaries and status reports refer to specific legislation and often reflect a view on such legislation, they do not encourage the newsletter recipients to take action with respect to such legislation. The summaries and status reports are not grass roots lobbying communications.

Example 7. Organization B prints in its newsletter a report on pending legislation that B supports, the Family Equity bill. The report refers to and reflects a view on the Family Equity bill, but does not directly encourage recipients to take action. Nor does the report specifically identify any legislator as opposing the communication's view on the legislation, as being undecided, or as being a member of the legislative committee or subcommittee that will consider the legislation. However, the report does state the following: Rep. Doe (D-Ky.) and Rep. Roe (R-Ma.), both

ardent supporters of the Family Equity bill, spoke at B's annual convention last week. Both encouraged B's efforts to get the Family Equity bill enacted and stated that they thought the bill could be enacted even over a presidential veto. B's legislative affairs liaison questioned others, who seemed to agree with that assessment. For example, Sen. Roe (I-Ca.) said that he thinks the bill will pass with such a large majority, "the President won't even consider vetoing it."

Assume the newsletter, and thus the report, is sent to individuals throughout the U.S., including some recipients in Kentucky, Massachusetts and California. Because the report is distributed nationally, the mere fact that the report identifies several legislators by party and state as part of its discussion does not mean the report specifically identifies the named legislators as the Kentucky, Massachusetts and California recipients' representatives in the legislature for purposes of paragraph (b)(2)(iii) of this section. The report is not a grass roots lobbying communication.

(B) *Communications that are grass roots lobbying communications.*

Example 1. A pamphlet distributed by organization Y states that the "President's plan for a drug-free America," which will establish a drug control program, should be passed. The pamphlet encourages readers to "write or call your senators and representatives and tell them to vote for the President's plan." No legislative proposal formally bears the name "President's plan for a drug-free America," but that and similar terms have been widely used in connection with specific legislation pending in Congress that was initially proposed by the President. Thus, the pamphlet refers to specific legislation, reflects a view on the legislation, and encourages readers to take action with respect to the legislation. The pamphlet is a grass roots lobbying communication.

Example 2. Assume the same facts as in Example (1), except that the pamphlet does not encourage the public to write or call representatives, but does list the members of the committee that will consider the bill. The pamphlet is a grass roots lobbying communication.

Example 3. Assume the same facts as in Example (1), except that the pamphlet encourages readers to "write the President to urge him to make the bill a top legislative priority" rather than encouraging readers to communicate with members of Congress. The pamphlet is a grass roots lobbying communication.

Example 4. Organization B, a nonmembership organization, includes in one of three sections of its newsletter an endorsement of two pending bills and opposition to another pending bill and also identifies several legislators as undecided on the three bills. The section of the newsletter devoted to the three pending bills is a grass roots lobbying communication.

Example 5. Organization D, a nonmembership organization, sends a letter to

all persons on its mailing list. The letter includes an extensive discussion concluding that a significant increase in spending for the Air Force is essential in order to provide an adequate defense of the nation. Prior to a concluding fundraising request, the letter encourages readers to write their Congressional representatives urging increased appropriations to build the B-1 bomber. The letter is a grass roots lobbying communication.

Example 6. The President nominates X for a position in the President's cabinet. Organization Y disagrees with the views of X and does not believe X has the necessary administrative capabilities to effectively run a cabinet-level department. Accordingly, Y sends a general mailing requesting recipients to write to four Senators on the Senate Committee that will consider the nomination. The mailing is a grass roots lobbying communication.

Example 7. Organization F mails letters requesting that each recipient contribute money to or join F. In addition, the letters express F's opposition to a pending bill that is to be voted upon by the U.S. House of Representatives. Although the letters are form letters sent as a mass mailing, each letter is individualized to report to the recipient the name of the recipient's congressional representative. The letters are grass roots lobbying communications.

Example 8. Organization C sends a mailing that opposes a specific legislative proposal and includes a postcard addressed to the President for the recipient to sign stating opposition to the proposal. The letter requests that the recipient send to C a contribution as well as the postcard opposing the proposal. C states in the letter that it will deliver all the postcards to the White House. The letter is a grass roots lobbying communication.

(C) *Additional examples. Example 1.* The newsletter of an organization concerned with drug issues is circulated primarily to individuals who are not members of the organization. A story in the newsletter reports on the prospects for passage of a specifically identified bill, stating that the organization supports the bill. The newsletter story identifies certain legislators as undecided, but does not state that readers should contact the undecided legislators. The story does not provide a full and fair exposition sufficient to qualify as nonpartisan analysis, study or research. The newsletter story is a grass roots lobbying communication.

Example 2. Assume the same facts as in Example (1), except that the newsletter story provides a full and fair exposition sufficient to qualify as nonpartisan analysis, study or research. The newsletter story is not a grass roots lobbying communication because it is within the exception for nonpartisan analysis, study or research (since it does not directly encourage recipients to take action).

Example 3. Assume the same facts as in Example (2), except that the newsletter story explicitly asks readers to contact the undecided legislators. Because the

newsletter story directly encourages readers to take action with respect to the legislation, the newsletter story is not within the exception for nonpartisan analysis, study or research. Accordingly, the newsletter story is a grass roots lobbying communication.

Example 4. Assume the same facts as in Example (1), except that the story does not identify any undecided legislators. The story is not a grass roots lobbying communication.

Example 5. X organization places an advertisement that specifically identifies and opposes a bill that X asserts would harm the farm economy. The advertisement is not a mass media communication described in paragraph (b)(5)(ii) of this section and does not directly encourage readers to take action with respect to the bill. However, the advertisement does state that Senator Y favors the legislation. Because the advertisement refers to and reflects a view on specific legislation, and also encourages the readers to take action with respect to the legislation by specifically identifying a legislator who opposes X's views on the legislation, the advertisement is a grass roots lobbying communication.

Example 6. Assume the same facts as in Example (5), except that instead of identifying Senator Y as favoring the legislation, the advertisement identifies the "junior Senator from State Z" as favoring the legislation. The advertisement is a grass roots lobbying communication.

Example 7. Assume the same facts as in Example (5), except that instead of identifying Senator Y as favoring the legislation, the advertisement states: "Even though this bill will have a devastating effect upon the farm economy, most of the Senators from the Farm Belt states are inexplicably in favor of the bill." The advertisement does not specifically identify one or more legislators as opposing the advertisement's view on the bill in question. Accordingly, the advertisement is not a grass roots lobbying communication because it does not encourage readers to take action with respect to the legislation.

Example 8. Organization V trains volunteers to go door-to-door to seek signatures for petitions to be sent to legislators in favor of a specific bill. The volunteers are wholly unreimbursed for their time and expenses. The volunteers' costs (to the extent any are incurred) are not lobbying or exempt purpose expenditures made by V (but the volunteers may not deduct their out-of-pocket expenditures (see section 170(f)(6)). When V asks the volunteers to contact others and urge them to sign the petitions, V encourages those volunteers to take action in favor of the specific bill. Accordingly, V's costs of soliciting the volunteers' help and its costs of training the volunteers are grass roots expenditures. In addition, the costs of preparing, copying, distributing, etc. the petitions (and any other materials on the same specific subject used in the door-to-door signature gathering effort), are grass roots

expenditures.

(5) *Special rule for certain mass media advertisements*-(i) *In general.* A mass media advertisement that is not a grass roots lobbying communication under the three-part grass roots lobbying definition contained in paragraph (b)(2) of this section may be a grass roots lobbying communication by virtue of paragraph (b)(5)(ii) of this section. The special rule in paragraph (b)(5)(ii) generally applies only to a limited type of paid advertisements that appear in the mass media.

(ii) *Presumption regarding certain paid mass media advertisements about highly publicized legislation.* If within two weeks before a vote by a legislative body, or a committee (but not a subcommittee) thereof, on a highly publicized piece of legislation, an organization's paid advertisement appears in the mass media, the paid advertisement will be presumed to be a grass roots lobbying communication, but only if the paid advertisement both reflects a view on the general subject of such legislation and either: refers to the highly publicized legislation; or encourages the public to communicate with legislators on the general subject of such legislation. An organization can rebut this presumption by demonstrating that the paid advertisement is a type of communication regularly made by the organization in the mass media without regard to the timing of legislation (that is, a customary course of business exception) or that the timing of the paid advertisement was unrelated to the upcoming legislative action. Notwithstanding the fact that an organization successfully rebuts the presumption, a mass media communication described in this paragraph (b)(5)(ii) is a grass roots lobbying communication if the communication would be a grass roots lobbying communication under the rules contained in paragraph (b)(2) of this section.

(iii) *Definitions*-(A) *Mass media.* For purposes of this paragraph (b)(5), the term "mass media" means television, radio, billboards and general circulation newspapers and magazines. General circulation newspapers and magazines do not include newspapers or magazines published by an organization for which the expenditure test election under section 501(h) is in effect, except where both: The total circulation of the newspaper or magazine is greater than 100,000; and fewer than one-half of the recipients are members of the organization (as defined in § 56.4911-5(f)).

(B) *Paid advertisement.* For purposes of this paragraph (b)(5), where an electing public charity is itself a mass media publisher or broadcaster, all portions of that organization's mass media publications or broadcasts are treated as paid advertisements in the mass media, except those specific portions that are advertisements paid for by another person. The term "mass media" is defined in paragraph (b)(5)(iii)(A).

(C) *Highly publicized.* For purposes of this paragraph (b)(5), "highly publi-

cized" means frequent coverage on television and radio, and in general circulation newspapers, during the two weeks preceding the vote by the legislative body or committee. In the case of state or local legislation, "highly publicized" means frequent coverage in the mass media that serve the State or local jurisdiction in question. Even where legislation receives frequent coverage, it is "highly publicized" only if the pendency of the legislation or the legislation's general terms, purpose, or effect are known to a significant segment of the general public (as opposed to the particular interest groups directly affected) in the area in which the paid mass media advertisement appears.

(iv) *Examples.* The special rule of this paragraph (b)(5) is illustrated by the following examples. The expenditure test election under section 501(h) is assumed to be in effect for all organizations discussed in the examples in this paragraph (b)(5)(iv):

Example 1. Organization X places a television advertisement advocating one of the President's major foreign policy initiatives, as outlined by the President in a series of speeches and as drafted into proposed legislation. The initiative is popularly known as "the President's World Peace Plan," and is voted upon by the Senate four days after X's advertisement. The advertisement concludes: "SUPPORT THE PRESIDENT'S WORLD PEACE PLAN!" The President's plan and position are highly publicized during the two weeks before the Senate vote, as evidenced by: coverage of the plan on several nightly television network news programs; more than one article about the plan on the front page of a majority of the country's ten largest daily general circulation newspapers; and an editorial about the plan in four of the country's ten largest daily general circulation newspapers. Although the advertisement does not encourage readers to contact legislators or other government officials, the advertisement does refer to specific legislation and reflect a view on the general subject of the legislation. The communication is presumed to be a grass roots lobbying communication.

Example 2. Assume the same facts as in Example (1), except that the advertisement appears three weeks before the Senate's vote on the plan. Because the advertisement appears more than two weeks before the legislative vote, the advertisement is not within the scope of the special rule for mass media communications on highly publicized legislation. Accordingly, the advertisement is a grass roots lobbying communication only if it is described in the general definition contained in paragraph (b)(2) of this section. Because the advertisement does not encourage recipients to take action with respect to the legislation in question, the advertisement is not a grass roots lobbying communication.

Example 3. Organization Y places a newspaper advertisement advocating increased government funding for certain public works projects the President has

proposed and that are being considered by a legislative committee. The advertisement explains the President's proposals and concludes: "SUPPORT FUNDING FOR THESE VITAL PROJECTS!" The advertisement does not encourage readers to contact legislators or other government officials nor does it name any undecided legislators, but it does name the legislation being considered by the committee. The President's proposed funding of public works, however, is not highly publicized during the two weeks before the vote: there has been little coverage of the issue on nightly television network news programs, only one front-page article on the issue in the country's ten largest daily general circulation newspapers, and only one editorial about the issue in the country's ten largest daily general circulation newspapers. Two days after the advertisement appears, the committee votes to approve funding of the projects. Although the advertisement appears less than two weeks before the legislative vote, the advertisement is not within the scope of the special rule for mass media communications on highly publicized legislation because the issue of funding for public works projects is not highly publicized. Thus, the advertisement is a grass roots lobbying communication only if it is described in the general definition contained in paragraph (b)(2) of this section. Because the advertisement does not encourage recipients to take action with respect to the legislation in question, the advertisement is not a grass roots lobbying communication.

Example 4. Organization P places numerous advertisements in the mass media about a bill being considered by the State Assembly. The bill is highly publicized, as evidenced by numerous front-page articles, editorials and letters to the editor published in the state's general circulation daily newspapers, as well as frequent coverage of the bill by the television and radio stations serving the state. The advertisements run over a three week period and, in addition to showing pictures of a family being robbed at gunpoint, say: "The State Assembly is considering a bill to make gun ownership illegal. This outrageous legislation would violate your constitutional rights and the rights of other law-abiding citizens. If this legislation is passed, you and your family will be criminals if you want to exercise your right to protect yourselves." The advertisements refer to and reflect a view on a specific bill but do not encourage recipients to take action. Sixteen days after the last advertisement runs, a State Assembly committee votes to defeat the legislation. None of the advertisements is a grass roots lobbying communication.

Example 5. Assume the same facts as in Example (4), except that it is publicly announced prior to the advertising campaign that the committee vote is scheduled for five days after the last advertisement runs. Because of public pressure resulting from the advertising campaign, the bill is withdrawn and no vote is ever taken. None of the advertisements is a grass roots lobbying communication.

(c) *Exceptions to the definitions of direct lobbying communication and grass roots lobbying communication*-(1) *Nonpartisan analysis, study, or research exception*-(i) *In general.* Engaging in nonpartisan analysis, study, or research and making available to the general public or a segment or members thereof or to governmental bodies, officials, or employees the results of such work constitute neither a direct lobbying communication under § 56.4911-2(b)(1) nor a grass roots lobbying communication under § 56.4911-2(b)(2).

(ii) *Nonpartisan analysis, study, or research.* For purposes of this section, "nonpartisan analysis, study, or research" means an independent and objective exposition of a particular subject matter, including any activity that is "educational" within the meaning of § 1.501(c)(3)-1(d)(3). Thus, "nonpartisan analysis, study, or research" may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. The mere presentation of unsupported opinion, however, does not qualify as "nonpartisan analysis, study, or research".

(iii) *Presentation as part of a series.* Normally, whether a publication or broadcast qualifies as "nonpartisan analysis, study, or research" will be determined on a presentation-by-presentation basis. However, if a publication or broadcast is one of a series prepared or supported by an electing organization and the series as a whole meets the standards of paragraph (c)(1)(ii) of this section, then any individual publication or broadcast within the series is not a direct or grass roots lobbying communication even though such individual broadcast or publication does not, by itself, meet the standards of paragraph (c)(1)(ii) of this section. Whether a broadcast or publication is considered part of a series will ordinarily depend upon all the facts and circumstances of each particular situation. However, with respect to broadcast activities, all broadcasts within any period of six consecutive months will ordinarily be eligible to be considered as part of a series. If an electing organization times or channels a part of a series which is described in this paragraph (c)(1)(iii) in a manner designed to influence the general public or the action of a legislative body with respect to a specific legislative proposal, the expenses of preparing and distributing such part of the analysis, study, or research will be expenditures for a direct or grass roots lobbying communications, as the case may be.

(iv) *Making available results of nonpartisan analysis, study, or research.* An organization may choose any suitable means, including oral or written presentations, to distribute the results of its nonpartisan analysis, study, or research, with or without charge. Such means include distribution of reprints of speeches, articles and reports; presentation of information through conferences, meetings and discussions; and dissemination to the news media, including radio, television and

newspapers, and to other public forums. For purposes of this paragraph (c)(1)(iv), such communications may not be limited to, or be directed toward, persons who are interested solely in one side of a particular issue.

(v) *Subsequent lobbying use of certain analysis, study or research.* Even though certain analysis, study or research is initially within the exception for nonpartisan analysis, study or research, subsequent use of that analysis, study or research for grass roots lobbying may cause that analysis, study or research to be treated as a grass roots lobbying communication that is not within the exception for nonpartisan analysis, study or research. This paragraph (c)(1)(v) does not cause any analysis, study or research to be considered a direct lobbying communication. For rules regarding when analysis, study or research is treated as a grass roots lobbying communication that is not within the scope of the exception for nonpartisan analysis, study or research, see paragraph (b)(2)(v) of this section.

(vi) *Directly encouraging action by recipients of a communication.* A communication that reflects a view on specific legislation is not within the nonpartisan analysis, study, or research exception of this paragraph (c)(1) if the communication directly encourages the recipient to take action with respect to such legislation. For purposes of this section, a communication directly encourages the recipient to take action with respect to legislation if the communication is described in one or more of paragraphs (b)(2)(iii) (A) through (C) of this section. As described in paragraph (b)(2)(iv) of this section, a communication would encourage the recipient to take action with respect to legislation, but not directly encourage such action, if the communication does no more than specifically identify one or more legislators who will vote on the legislation as: opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee or subcommittee that will consider the legislation.

(vii) *Examples.* The provisions of this paragraph (c)(1) may be illustrated by the following examples: *Example 1.* Organization M establishes a research project to collect information for the purpose of showing the dangers of the use of pesticides in raising crops. The information collected includes data with respect to proposed legislation, pending before several State legislatures, which would ban the use of pesticides. The project takes favorable positions on such legislation without producing a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion on the pros and cons of the use of pesticides. This project is not within the exception for nonpartisan analysis, study, or research because it is designed to present information merely on one side of the legislative controversy.

Example 2. Organization N establishes a research project to collect informa-

tion concerning the dangers of the use of pesticides in raising crops for the ostensible purpose of examining and reporting information as to the pros and cons of the use of pesticides in raising crops. The information is collected and distributed in the form of a published report which analyzes the effects and costs of the use and nonuse of various pesticides under various conditions on humans, animals and crops. The report also presents the advantages, disadvantages, and economic cost of allowing the continued use of pesticides unabated, of controlling the use of pesticides, and of developing alternatives to pesticides. Even if the report sets forth conclusions that the disadvantages as a result of using pesticides are greater than the advantages of using pesticides and that prompt legislative regulation of the use of pesticides is needed, the project is within the exception for nonpartisan analysis, study, or research since it is designed to present information on both sides of the legislative controversy and presents a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion.

Example 3. Organization O establishes a research project to collect information on the presence or absence of disease in humans from eating food grown with pesticides and the presence or absence of disease in humans from eating food not grown with pesticides. As part of the research project, O hires a consultant who prepares a "fact sheet" which calls for the curtailment of the use of pesticides and which addresses itself to the merits of several specific legislative proposals to curtail the use of pesticides in raising crops which are currently pending before State Legislatures. The "fact sheet" presents reports of experimental evidence tending to support its conclusions but omits any reference to reports of experimental evidence tending to dispute its conclusions. O distributes ten thousand copies to citizens' groups. Expenditures by O in connection with this work of the consultant are not within the exception for nonpartisan analysis, study, or research.

Example 4. P publishes a bi-monthly newsletter to collect and report all published materials, ongoing research, and new developments with regard to the use of pesticides in raising crops. The newsletter also includes notices of proposed pesticide legislation with impartial summaries of the provisions and debates on such legislation. The newsletter does not encourage recipients to take action with respect to such legislation, but is designed to present information on both sides of the legislative controversy and does present such information fully and fairly. It is within the exception for nonpartisan analysis, study, or research.

Example 5. X is satisfied that A, a member of the faculty of Y University, is exceptionally well qualified to undertake a project involving a comprehensive study of the effects of pesticides on crop yields. Consequently, X makes a grant to A to underwrite the cost of the study and of the preparation of a book on the effect

of pesticides on crop yields. X does not take any position on the issues or control the content of A's output. A produces a book which concludes that the use of pesticides often has a favorable effect on crop yields, and on that basis argues against pending bills which would ban the use of pesticides. A's book contains a sufficiently full and fair exposition of the pertinent facts, including known or potential disadvantages of the use of pesticides, to enable the public or an individual to form an independent opinion or conclusion as to whether pesticides should be banned as provided in the pending bills. The book does not directly encourage readers to take action with respect to the pending bills. Consequently, the book is within the exception for nonpartisan analysis, study, or research.

Example 6. Assume the same facts as Example (2), except that, instead of issuing a report, X presents within a period of 6 consecutive months a two-program television series relating to the pesticide issue. The first program contains information, arguments, and conclusions favoring legislation to restrict the use of pesticides. The second program contains information, arguments, and conclusions opposing legislation to restrict the use of pesticides. The programs are broadcast within 6 months of each other during commensurate periods of prime time. X's programs are within the exception for nonpartisan analysis, study, or research. Although neither program individually could be regarded as nonpartisan, the series of two programs constitutes a balanced presentation.

Example 7. Assume the same facts as in Example (6), except that X arranged for televising the program favoring legislation to restrict the use of pesticides at 8:00 on a Thursday evening and for televising the program opposing such legislation at 7:00 on a Sunday morning. X's presentation is not within the exception for nonpartisan analysis, study, or research, since X disseminated its information in a manner prejudicial to one side of the legislative controversy.

Example 8. Organization Z researches, writes, prints and distributes a study on the use and effects of pesticide X. A bill is pending in the U.S. Senate to ban the use of pesticide X. Z's study leads to the conclusion that pesticide X is extremely harmful and that the bill pending in the U.S. Senate is an appropriate and much needed remedy to solve the problems caused by pesticide X. The study contains a sufficiently full and fair exposition of the pertinent facts, including known or potential advantages of the use of pesticide X, to enable the public or an individual to form an independent opinion or conclusion as to whether pesticides should be banned as provided in the pending bills. In its analysis of the pending bill, the study names certain undecided Senators on the Senate committee considering the bill. Although the study meets the three part test for determining whether a communication is a grass roots lobbying communication, the study is within the exception for nonpartisan analysis, study or research, because it does not directly en-

courage recipients of the communication to urge a legislator to oppose the bill.

Example 9. Assume the same facts as in Example (8), except that, after stating support for the pending bill, the study concludes: "You should write to the undecided committee members to support this crucial bill." The study is not within the exception for nonpartisan analysis, study or research because it directly encourages the recipients to urge a legislator to support a specific piece of legislation.

Example 10. Organization X plans to conduct a lobbying campaign with respect to illegal drug use in the United States. It incurs $5,000 in expenses to conduct research and prepare an extensive report primarily for use in the lobbying campaign. Although the detailed report discusses specific pending legislation and reaches the conclusion that the legislation would reduce illegal drug use, the report contains a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent conclusion regarding the effect of the legislation. The report does not encourage readers to contact legislators regarding the legislation. Accordingly, the report does not, in and of itself, constitute a lobbying communication. Copies of the report are available to the public at X's office, but X does not actively distribute the report or otherwise seek to make the contents of the report available to the general public. Whether or not X's distribution is sufficient to meet the requirement in § 56.4911-2(c)(1)(iv) that a nonpartisan communication be made available, X's distribution is not substantial (for purposes of § 56.4911-2(b)(2)(v)(E)) in light of all of the facts and circumstances, including the normal distribution pattern of similar nonpartisan reports. X then mails copies of the report, along with a letter, to 10,000 individuals on X's mailing list. In the letter, X requests that individuals contact legislators urging passage of the legislation discussed in the report. Because X's research and report were primarily undertaken by X for lobbying purposes and X did not make a substantial distribution of the report (without an accompanying lobbying message) prior to or contemporaneously with the use of the report in lobbying, the report is a grass roots lobbying communication that is not within the exception for nonpartisan analysis, study or research.

Example 11. Assume the same facts as in Example (10), except that before using the report in the lobbying campaign, X sends the research and report (without an accompanying lobbying message) to universities and newspapers. At the same time, X also advertises the availability of the report in its newsletter. This distribution is similar in scope to the normal distribution pattern of similar nonpartisan reports. In light of all of the facts and circumstances, X's distribution of the report is substantial. Because of X's substantial distribution of the report, X's primary purpose will be considered to be other than for use in lobbying and the report will not be considered a grass roots lobbying communication. Accordingly, only the

expenditures for copying and mailing the report to the 10,000 individuals on X's mailing list, as well as for preparing and mailing the letter, are expenditures for grass roots lobbying communications.

Example 12. Organization M pays for a bumper sticker that reads: "STOP ABORTION: Vote NO on Prop. X!" M also pays for a 30-second television advertisement and a billboard that similarly advocate opposition to Prop. X. In light of the limited scope of the communications, none of the communications is within the exception for nonpartisan analysis, study or research. First, none of the communications rises to the level of analysis, study or research. Second, none of the communications is nonpartisan because none contains a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. Thus, each communication is a direct lobbying communication.

(2) *Examinations and discussions of broad social, economic, and similar problems.* Examinations and discussions of broad social, economic, and similar problems are neither direct lobbying communications under § 56.4911-2(b)(1) nor grass roots lobbying communications under § 56.4911-2(b)(2) even if the problems are of the type with which government would be expected to deal ultimately. Thus, under §§ 56.4911-2(b)(1) and (2), lobbying communications do not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, so long as such discussion does not address itself to the merits of a specific legislative proposal and so long as such discussion does not directly encourage recipients to take action with respect to legislation. For example, this paragraph (c)(2) excludes from grass roots lobbying under § 56.4911-2(b)(2) an organization's discussions of problems such as environmental pollution or population growth that are being considered by Congress and various State legislatures, but only where the discussions are not directly addressed to specific legislation being considered, and only where the discussions do not directly encourage recipients of the communication to contact a legislator, an employee of a legislative body, or a government official or employee who may participate in the formulation of legislation.

(3) *Requests for technical advice.* A communication is not a direct lobbying communication under § 56.4911-2(b)(1) if the communication is the providing of technical advice or assistance to a governmental body, a governmental committee, or a subdivision of either in response to a written request by the body, committee, or subdivision, as set forth in § 53.4945-2(d)(2).

(4) *Communications pertaining to "self-defense" by the organization.* A communication is not a direct lobbying communication under § 56.4911-2(b)(1) if ei-

ther:

(i) The communication is an appearance before, or communication with, any legislative body with respect to a possible action by the body that might affect the existence of the electing public charity, its powers and duties, its tax-exempt status, or the deductibility of contributions to the organization, as set forth in § 53.4945-2(d)(3);

(ii) The communication is by a member of an affiliated group of organizations (within the meaning of § 56.4911-7(e)), and is an appearance before, or communication with, a legislative body with respect to a possible action by the body that might affect the existence of any other member of the group, its powers and duties, its tax-exempt status, or the deductibility of contributions to it;

(iii) The communication is by an electing public charity more than 75 percent of the members of which are other organizations that are described in section 501(c)(3), and is an appearance before, or communication with, any legislative body with respect to a possible action by the body which might affect the existence of one or more of the section 501(c)(3) member organizations, their powers, duties, or tax-exempt status, or the deductibility (under section 170) of contributions to one or more of the section 501(c)(3) member organizations, but only if the principal purpose of the appearance or communication is to defend the section 501(c)(3) member organizations (rather than the non-section 501(c)(3) member organizations); or

(iv) The communication is by an electing public charity that is a member of a limited affiliated group or organizations under § 56.4911-10, and is an appearance before, or communication with, the Congress of the United States with respect to a possible action by the Congress that might affect the existence of any member of the limited affiliated group, its powers and duties, tax-exempt status, or the deductibility of contributions to it.

(v) Under the self-defense exception of paragraphs (c)(4)(i) through (iv) of this section, a charity may communicate with an entire legislative body, with committees or subcommittees of a legislative body, with individual legislators, with legislative staff members, or with representatives of the executive branch who are involved with the legislative process, so long as such communication is limited to the prescribed subjects. Similarly, under the self-defense exception, a charity may make expenditures in order to initiate legislation if such legislation concerns only matters which might affect the existence of the charity, its powers and duties, its tax-exempt status, or the deductibility of contributions to such charity. For examples illustrating the application and scope of the self-defense exception of this paragraph (c)(4), see § 53.4945-2(d)(3)(ii).

(d) *Definitions.* For purposes of section 4911 and the regulations thereunder-

(1) *Legislation*-(i) *In general.* "Legislation" includes action by the Congress, any state legislature, any local council, or similar legislative body, or by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure. "Legislation" includes a proposed treaty required to be submitted by the President to the Senate for its advice and consent from the time the President's representative begins to negotiate its position with the prospective parties to the proposed treaty.

(ii) *Definition of specific legislation.* For purposes of paragraphs (b)(1) and (b)(2) of this section, "specific legislation" includes both legislation that has already been introduced in a legislative body and a specific legislative proposal that the organization either supports or opposes. In the case of a referendum, ballot initiative, constitutional amendment, or other measure that is placed on the ballot by petitions signed by a required number or percentage of voters, an item becomes "specific legislation" when the petition is first circulated among voters for signature.

(iii) *Examples.* The terms "legislation" and "specific legislation" are illustrated using the following examples: *Example 1.* A nonmembership organization includes in its newsletter an article about problems with the use of pesticide X that states in part: "Legislation that is pending in Congress would prohibit the use of this very dangerous pesticide. Fortunately, the legislation will probably be passed. Write your congressional representatives about this important issue." This is a grass roots lobbying communication that refers to and reflects a view on specific legislation and that encourages recipients to take action with respect to that legislation.

Example 2. An organization based in State A notes in its newsletter that State Z has passed a bill to accomplish a stated purpose and then says that State A should pass such a bill. The organization urges readers to write their legislators in favor of such a bill. No such bill has been introduced into the State A legislature. The organization has referred to and reflected a view on a specific legislative proposal and has also encouraged readers to take action thereon.

(2) *Action.* The term "action" in paragraph (d)(1)(i) of this section is limited to the introduction, amendment, enactment, defeat or repeal of Acts, bills, resolutions, or similar items.

(3) *Legislative body.* "Legislative body" does not include executive, judicial, or administrative bodies.

(4) *Administrative bodies.* "Administrative bodies" includes school boards, housing authorities, sewer and water districts, zoning boards, and other similar Federal, State, or local special purpose bodies, whether elective or appointive. Thus, for example, for purposes of section 4911, the term "any attempt to influ-

ence any legislation" does not include attempts to persuade an executive body or department to form, support the formation of, or to acquire property to be used for the formation or expansion of, a public park or equivalent preserves (such as public recreation areas, game, or forest preserves, and soil demonstration areas) established or to be established by act of Congress, by executive action in accordance with an act of Congress, or by a State, municipality or other governmental unit described in section 170(c)(1), as compared with attempts to persuade a legislative body, a member thereof, or other governmental official or employee, to promote the appropriation of funds for such an acquisition or other legislative authorization of such an acquisition. Therefore, for example, an organization would not be influencing legislation for purposes of section 4911, if it proposed to a Park Authority that it purchase a particular tract of land for a new park, even though such an attempt would necessarily require the Park Authority eventually to seek appropriations to support a new park. However, in such a case, the organization would be influencing legislation, for purposes of section 4911, if it provided the Park Authority with a proposed budget to be submitted to a legislative body, unless such submission is described by one of the exceptions set forth in paragraph (c) of this section.

"METHODOLOGY TEST"

Rev. Proc. 86-43, 1986-2 C.B. 729[1]

SECTION 1. PURPOSE

The purpose of this revenue procedure is to publish the criteria used by the Internal Revenue Service to determine the circumstances under which advocacy of a particular viewpoint or position by an organization is considered educational within the meaning of section 501(c)(3) of the Internal Revenue Code, and within the meaning of section 1.501(c)(3)-1(d)(3) of the Income Tax Regulations.

SEC. 2. BACKGROUND

.01 Section 501(c)(3) of the Code provides for exemption from federal income tax for organizations that are organized and operated exclusively for purposes specified in that section, including educational purposes. Section 1.501(c)(3)-1(d)(3) of the regulations provides that the term 'educational' relates to a) the instruction or training of the individual for the purpose of improving or developing his capabilities; or b) the instruction of the public on subjects useful to the individual and beneficial to the community. Under this regulation, an organization may be educational even though it advocates a particular position or viewpoint, so long

[1] *Available at* https://www.irs.gov/pub/irs-tege/rp_1986-43.pdf.

as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

.02 In applying section 1.501(c)(3)-1(d)(3) of the regulations, the Service has attempted to eliminate or minimize the potential for any public official to impose his or her preconceptions or beliefs in determining whether the particular viewpoint or position is educational. It has been, and it remains, the policy of the Service to maintain a position of disinterested neutrality with respect to the beliefs advocated by an organization. The focus of section 1.501(c)(3)-1(d)(3), and of the Service's application of this regulation, is not upon the viewpoint or position, but instead upon the method used by the organization to communicate its viewpoint or positions to others.

.03 Two recent court decisions have considered challenges to the constitutionality of section 1.501(c)(3)-1(d)(3) of the regulations. One decision held that the regulation was unconstitutionally vague. Big Mama Rag, Inc. v. United States, 631 F. 2d. 1030 (D.C. Cir. 1980). However, in National Alliance v. United States, 710 F. 2d 868 (D.C. Cir. 1983), the court upheld the Service's position that the organization in question was not educational. Although the latter decision did not reach the question of the constitutionality of section 1.501(c)(3)-1(d)(3), it did note that the methodology test used by the Service when applying the regulation 'tend[s] toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process.' The court also noted that the application of this test reduced the vagueness found in the earlier Big Mama Rag decision.

.04 The methodology test cited by the court in National Alliance reflects the long-standing Service position that the method used by an organization in advocating its position, rather than the position itself, is the standard for determining whether an organization has educational purposes. This methodology test is set forth in Section 3 of this revenue procedure, and is used in all situations where the educational purposes of an organization that advocates a particular viewpoint or position are in question. Publication of this test represents no change either to existing procedures or to the substantive position of the Service.

SEC. 3. CRITERIA USED TO DETERMINE WHETHER ADVOCACY BY AN ORGANIZATION IS EDUCATIONAL

.01 The Service recognizes that the advocacy of particular viewpoints or positions may serve an educational purpose even if the viewpoints or positions being advocated are unpopular or are not generally accepted.

.02 Although the Service renders no judgment as to the viewpoint or position

of the organization, the Service will look to the method used by the organization to develop and present its views. The method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process.

.03 The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is not educational.

1 The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.

2 The facts that purport to support the viewpoints or positions are distorted.

3 The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.

4 The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.

.04 There may be exceptional circumstances, however, where an organization's advocacy may be educational even if one of more of the factors listed in section 3.03 are present. The Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors.

SEC. 4. OTHER REQUIREMENTS

Even if the advocacy undertaken by an organization is determined to be educational under the above criteria, the organization must still meet all other requirements for exemption under section 501(c)(3), including the restrictions on influencing legislation and political campaigning contained therein.